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DOCKET ENTRIES

AUGUST M. LEDESMA, JR.,
HAROLD J. SPEISS, and
LAWRENCE P. PITTMAN,

versus

Plaintiffs,
CA No. 69-322

LEANDER H. PEREZ, JR., Individually and as District
Attorney for the Twenty-Fifth Judicial District, State
of Louisiana;

LOUIS REICHART, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

GEORGE BETHEA, Individually and as a Deputy in
the Sheriff's Office in the Parish of St. Bernard, State
of Louisiana; and

EARL WENDLING, Individually and as a Deputy in
the Sheriff's Office in the Parish of St. Bernard, State
of Louisiana,

Defendants.

DATE PROCEEDINGS

2/17/69 Flg. Complaint. Issg. 4 summons. Exhibits
A & B annexed.

2/17/69 Flg. Motion for Prelim. Injunc.

2/17/69 Flg. Motion for Temp. Restr. Order; UN-
SIGNED ORDER ANNEXED.

3/ 3/69 Flg. MR. on summons; serv. Earl Wendling;
Geo. Bethea; Capt. Reichart; all in pers.
2/24/69; Leander Perez, Jr., thru Charles
Livaudais, 2/24/69.

3/11/69 Flg. M & O that complaint be amended, etc.

- 3/12/69, FJRH. Ent. 3/15/69. Issg. notices
Issg. 4 summons.
- 3/24/69 Flg. ANSWER by Louis Reichert, George
Bethea and Earl Wendling
- 3/24/69 Flg. Designation of Judges Boyle, Sr., Rubin
& Wisdom to constitute 3-Judge Court. Judge
Heebe is relieved of this case with his con-
sent and Judge Boyle is substituted as Re-
questing Judge. Ent. 3/26/69. Issg. notices.
- 3/11/69 Flg Pls' amended motion for pre. injunc.
- 3/11/69 Flg Request by Atty Peebles for 3-Judge
Court.
- 3/27/69 ORDERED that conf. is set for 4/2/69, 4PM.
Ent. 4/1/69. Issg. notices.
- 4/8/69 Flg. M & O that Pl's motion to Amend Com-
plaint be granted, etc. 4/8/69, EJB, Sr. Ent.
4/11/69 Issg. notices. ISSG. 1 SUMMONS.
- 4/11/69 Flg M.R. on summons; serv. Leander Perez
thru Charles Livaudais; Capt. Louis Reichard
thru Mrs. Reichard; George Bethea; in pers;
Earl Wendling, in pers; all on 3/27/69.
- 4/15/69 ORDERED that three-Judge hearing on pl's
motions for temp. Restraining Order and Pre-
liminary Injunc. and on merits of cause is
set for April 21, 1969, 2PM. Ent. 4/15/69
Issg. notices.
- 4/15/69 Conf. held this day; Three-Judge hearing on
pls' motions for Temp. Restraining Order and
Prel. Injunct. is set for 4/21/69, 2 PM; etc.
(Judges Wisdom, Boyle & Rubin) Ent. 4/16/69.
Issg. notices.
- 4/21/69 Flg. Stipulation of Facts for hearing on mo-
tion for Prelim. Injunct.
- 4/21/69 Flg. ANSWER of Leander Perez, Jr.

- 4/21/69 Hearing on motions of Pls for Temp Restraining Order and Prelim. Injunc.; SUBMITTED. Ent. 4/22/69.
- 5/13/69 Flg. M.R. on summons; serv. Sidney Torres, in pers., 5/6/69.
- 7/14/69 Flg. OPINION by 3-Judge Court; ORDERED that judgment be ent. decreeing: that all seized materials be returned, etc; that said materials be suppressed as evidence etc.; that prelim. and permanent injunctions be denied; that jurisdiction be retained herein for issuance of such further orders as may be necessary & proper. JMW, EJB, Sr., Judge Rubin dissents in part, etc. ORDERED that St. Bernard Parish Ordinance No. 21-60 is unconstitutional; that jurisdiction be retained herein for issuance of such further orders as may be necessary & proper. EJB, Sr., 7/14/69. Ent. 7/14/69. Issg. notices.
- 7/30/69 Flg. TRIAL REQUEST by pltf.
- 8/ 8/69 Issuing Notice to Attend Pre Trial Conference on 11/20/69 at 8:30 A. M.
- 8/13/69 Flg. JUDGMENT; ORDERED that there be judg. that all seized materials be returned instanter, by defs to pls, etc.; that said materials be suppressed as evidence, etc.; that preliminary and permanent injunctions be denied, etc.; that St. Bernard Ordinance #21-60 is unconstitutional; that jurisdiction be retained herein for issuance of further orders as may be necessary, etc. 8/13/69, ADO'B, Jr. Approved as to form, EJB, Sr. Ent. 8/14/69. Issg. notices.

- 9/12/69 Flg. Notice of Appeal by Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling
- 9/15/69 Upon request of Defs-Appellants counsel, etc., it is ORDERED that Clerk is authorized, etc. to transport to Clerk of Court of Supreme Court, etc., all exhibits, etc.; FURTHER ORDERED that there be stay of Order of this Court which directed that all seized materials be returned, instanter, by defs. to those pls from whom they were seized. 9/15/69, ABR. Ent. 9/16/69. Issg. notices.
- 9/26/69 Flg. Motion of pls for partial summary judgment; Notice of Hearing, 10/15/69, 10A.M. Statement of Material Facts; Memo in favor; annexed
- 10/ 7/69 Flg. Statement of Material Facts by defs.
- 10/10/69 Flg. Notice of Appeal by Pls to Supreme Ct. from portion of Judgment. 8/14/69. Issg. notices.
- 10/15/69 Flg. Motion of defs for stay, pending appeal; UNSIGNED order annexed.
- 10/16/69 ORDERED that pre trial conf. set for 11/20/69 is CONTINUED WITHOUT DATE, pending appeals, etc. Ent. 10/17/69. Issg notices.
- 10/15/69 Hearing on motion of Pls for partial summary judgment; CONTINUED WITHOUT DATE, etc. Ent. 10/17/69. Issg. notices.
- 9/ 3/69 Flg. Dissenting OPINION, ABR. Ent. 11/3/69. Issg. notices.

COMPLAINT FOR TEMPORARY RESTRAINING
ORDER, PRELIMINARY INJUNCTION, PERMA-
NENT INJUNCTION, DECLARATORY JUDGMENT
AND DAMAGES.

In the United States District Court
Eastern District of Louisiana
New Orleans Division

August M. Ledesma, Jr., Harold J. Speiss, and Lawrence
P. Pittman,

Plaintiffs,

versus

CA No. 69-322

Leander H. Perez, Jr., Individually and as District At-
torney for the Twenty-Fifth Judicial District, State of
Louisiana;

Louis Reichart, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

George Bethea, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana; and

Earl Wendling, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana,

Defendants.

Complainants respectfully represent:

I.

Lawrence P. Pittman, residing at 512 Harang, Met-

airie, Louisiana, is domiciled in the Parish of Jefferson; August M. Ledesma, Jr., residing at 1707 Agriculture Street, New Orleans, Louisiana, is domiciled in the Parish of Orleans; and Harold J. Speiss, residing at 4841 Bonita Drive, New Orleans, Louisiana, is domiciled in the Parish of Orleans. Plaintiffs are owners of a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad Bruxelles Seafood and News Center #3.

II.

Defendant Leander H. Perez, Jr. is District Attorney for the Twenty-Fifth Judicial District, State of Louisiana; Louis Reichart is a Captain in the Sheriff's Office for the Parish of St. Bernard, State of Louisiana; George Bethea is a Deputy in the Sheriff's Office of the Parish of St. Bernard, State of Louisiana; and Earl Wendling is a Deputy in the Sheriff's Office for the Parish of St. Bernard, State of Louisiana. This action is brought against the said defendants in their official capacities and individually.

III.

This is an action for legal and equitable relief to redress the deprivation under color of statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States as provided by 42 U.S.C. 1983, and is an action under the Federal Declaratory Judgment Act, 28 U.S.C. 2201.

IV.

The jurisdiction of this Court is invoked under 28 U.S.C. 1343, this being an action authorized by law to redress the deprivation under color of state law, statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States.

V.

The jurisdiction of this Court is also invoked under 28 U.S.C. 1331, this being a civil action wherein the matter in controversy exceeds, exclusive of interest and costs, the sum and value of \$10,000.00, and arises under the Constitution and laws of the United States.

VI.

At all times hereinafter mentioned, defendants Louis Reichart, George Bethea, and Earl Wendling, separately and in concert acted under color and pretense of law, to-wit, under color of the statutes, ordinances, regulations, customs and usages of the State of Louisiana and the Parish of St. Bernard, and particularly the Louisiana Obscenity Statute (LSA-R.S. 14:106), and St. Bernard Parish Ordinance No. 21-60. Each of the defendants herein, separately and in concert, engaged in the illegal conduct hereinafter mentioned to the injury of plaintiffs and deprived plaintiffs of their rights, privileges and immunities secured to them by the First and Fourteenth Amendments to the Constitution of the United States and the laws of the United States.

VII.

On January 27, 1969, at approximately 8:30 P.M., defendants Reichart, Bethea, and Wendling, raided the aforementioned Broad Bruxelles Seafood and News Center #3 and arrested Plaintiff August M. Ledesma, Jr. for displaying certain magazines, books, and playing cards. Defendants seized the said magazines, books, and playing cards. (A list of the publications seized has been attached as Plaintiffs' Exhibit "A", and is made a part of these pleadings).

VIII.

Defendants have instituted criminal proceedings against plaintiff Ledesma under the aforementioned Statutes for displaying the aforementioned books, magazines and playing cards. The said publications are not obscene and are protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution. The said books and magazines do not go substantially beyond customary limits of candor in the nation as a whole in the description or representation of matters pertaining to sex, nudity or excretion; the said material does not appeal to the prurient interest of the average person in the nation as a whole; and the said material is not utterly without redeeming social importance.

IX.

Defendants seized the aforementioned books and magazines and arrested plaintiff Ledesma prior to any

judicial adversary hearing on the issue of obscenity, in violation of the free speech and press provisions of the First and Fourteenth Amendments.

X.

The aforementioned search, seizure, and arrest was made without a search or arrest warrant of any kind and was conducted upon the sole, arbitrary, capricious, and non-judicial determination by the said defendants that the magazines or books were obscene. Each of the defendants, separately, and in concert, acted outside the scope of his jurisdiction and without authorization of law, and each of the defendants, separately and in concert acted willfully, knowingly and purposefully under color and pretense of the law, and more particularly under color and pretense of LSA-R.S. 14:106, being the Obscenity Statute of the State of Louisiana, and St. Bernard Ordinance No. 21-60.

XI.

Defendants have retained the said books and magazines in their custody, possession, and/or control.

XII.

The conduct of the defendants, as aforesaid, in designating obscene material which in fact and in law is not obscene has dissipated plaintiffs' efforts to have their said material sold and accepted as it is; i.e., non-obscene adult works of interest to the average normal adult person living in the Parish of St. Bernard, State of Louisiana.

XIII.

The aforesaid conduct of the defendants has tended to defame plaintiffs in their trade and business and interferes with plaintiffs' advantageous business relations.

XIV.

As a result of defendants' conduct, as aforesaid, plaintiff Ledesma has been required to retain an attorney to defend him against unfounded criminal charges, based upon an obscenity law known or which should be known by defendants to be in violation of the Federal Constitutional guarantees and with regard to material which the defendants know or should know is protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution.

XV.

Plaintiffs desire to continue to keep for sale and to sell non-obscene material without interference, harassment and intimidation by defendants, or any other person acting under color of law.

XVI.

The defendants, their agents, servants and employees, unlawfully, willfully, knowingly and deliberately, have deprived, and continue to deprive, plaintiffs of their rights, privileges and immunities secured to them by the United States Constitution:

- (A) By deciding, contrary to the applicable decisions of the United States Supreme Court, and other Appellate Courts of competent jurisdiction and contrary to the Constitution, to arbitrarily forbid the keeping for sale and selling of non-obscene material dealing with sex;
- (B) By arbitrarily and capriciously deciding to act as censors of constitutionally protected material under subjective standards formulated by defendants, their agents, servants and employees, contrary to law, all for the purpose of depriving the residents of the Parish of St. Bernard, State of Louisiana, access to non-obscene material dealing with sex;
- (C) By arresting plaintiff Ledesma, and threatening to make future similar arrests if material such as that seized is again displayed, which has the effect of coercing plaintiffs into refraining from selling non-obscene material dealing with sex.

XVII.

By reason of the conduct of defendants, as aforesaid, plaintiffs' civil rights under the First, Fourth, Fifth Eighth, Ninth and Fourteenth Amendments to the United States Constitution have been violated to their irreparable harm. Unless enjoined, defendants will continue in the course of conduct to plaintiffs' further imminent and irreparable harm, for which plaintiffs have

no adequate remedy at law. Immediate and irreparable injury, loss, and damage will result to plaintiffs if a temporary restraining order is not issued forbidding defendants from continuing in the conduct aforementioned.

XVIII.

The aforementioned search, seizure, and arrest, having been made without first obtaining a warrant of any kind, and having been made without a prior adversary judicial hearing of any kind, were unlawful and unreasonable and in violation of plaintiffs' rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

XIX.

The aforementioned search, seizure, and arrest were made under color of a State Statute, LSA-R.S. 14:106, and St. Bernard Parish Ordinance 21-60, which are unconstitutional on their face and as applied in this case.

XX.

As a result of the unauthorized, illegal, willfull and intentional interference with the conduct of plaintiffs' business and the deprivation by defendants of plaintiffs' rights secured by the Constitution and laws of the United States as aforesaid, plaintiffs have been damaged in the sum of \$30,000.00 each.

XXI.

Plaintiffs are entitled to and demand trial of the aforementioned facts by jury.

XXII.

St. Bernard Parish Ordinance No. 21-60 is clearly unconstitutional on its face, in violation of the Constitution of the United States, for the following reasons:

- (A) The said Ordinance is vague and does not define the acts sought to be denounced with such precision that the person sought to be held accountable may know whether his conduct falls within the purview of the act;
- (B) The said Ordinance, to the extent that it attempts to provide standards for determining obscenity, sets forth standards at variance with and insufficient for those minimum standards prescribed by the United States Supreme Court;
- (C) The said Ordinance does not include the necessary *scienter* requirements for obscenity in that it does not require that the person sought to be held accountable have knowledge of the fact of obscenity of the material involved.

XXIII.

St. Bernard Parish Ordinance No. 21-60 was uncon-

stitutionally applied in the case of the aforementioned seizure and arrest, for the following reasons:

- (A) The said Ordinance lacks procedural safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled;
- (B) The said Ordinance, in conjunction with the other laws of the State of Louisiana, denies to the person sought to be held accountable the right to trial by jury.

XXIV.

Plaintiffs are entitled to and desire that this Court enter a declaratory judgment under the provisions of 28 U.S.C. Section 2201, declaring St. Bernard Parish Ordinance 21-60 to be in violation of the Constitution of the United States, and plaintiffs are further entitled to and desire that under the same authority this Court declare any application of the aforementioned Ordinance to the sale of magazines and books in public newsstands to be unconstitutional. Plaintiffs further request that this Court declare the magazines and books seized to be non-obscene.

XXV.

On February 10, 1969, defendant Leander H. Perez, Jr., by his assistant, Charles Livaudais, filed criminal charges in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana, charging in four separate Bills of Information, that plaintiff

Ledesma committed the crime of Obscenity. Said charges arose directly out of and were based solely upon the aforementioned arrest of plaintiff. Two of the Bills (Nos. 17-087 and 17-088) alleged violation of St. Bernard Parish Ordinance 21-60, and two Bills (Nos. 17-085 and 17-086) alleged violation of LSA-R.S. 14:106.

XXVI.

The foregoing Statute and Ordinance are being enforced in bad faith by the aforementioned prosecutions.

XXVII.

The patent unconstitutionality of St. Bernard Parish Ordinance 21-60, on its face and as applied in this case, which Ordinance purports to regulate freedom of expression, justifies and requires federal equitable relief from state criminal prosecution.

XXVIII.

As a result of the aforementioned, plaintiffs are entitled to a declaratory judgment declaring their seized publications to be non-obscene and declaring St. Bernard Parish Ordinance 21-60 to be unconstitutional. Plaintiffs are further entitled to damages, and an injunction, restraining and enjoining defendants, and each of them, and persons in active concert or participation with them, from continuing the following unauthorized and unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 by seizing plaintiffs' magazines and/or books;
- (B) Enforcing or executing St. Bernard Ordinance No. 21-60 by arresting plaintiffs or their employees under color of authority of said Ordinance;
- (C) Alternatively, should the said Ordinance be held Constitutional, by enforcing the said Ordinance through the making of searches, seizures, and arrests without first obtaining a lawful warrant and conducting an adversary judicial proceeding.
- (D) Continuing to prosecute plaintiff Ledesma in the criminal cases filed against him arising out of the aforementioned arrest.

WHEREFORE, plaintiffs pray:

- (1) That a temporary restraining order issue immediately from this Court, restraining defendants herein from seizing magazines or books in the possession of plaintiffs while the said books or magazines are on the premises of newsstands open to the public within the Parish of St. Bernard, State of Louisiana, without first obtaining an appropriate warrant of search, seizure, or arrest, duly executed under laws of the State of Louisiana or in the United States of America, and after an appropriate adversary judicial proceeding;
- (2) That defendants be required to Answer this Com-

plaint in conformity with the rules and practice of this Honorable Court;

(3) That a declaratory judgment be entered herein declaring St. Bernard Ordinance 21-60 to be unconstitutional, or in the alternative, that this Court declare an application of the aforementioned Ordinance to the public exhibition or sale of magazines and books to be unconstitutional;

(4) That this Court declare plaintiffs' seized publications (Exhibit "A") to be non-obscene;

(5) That this Court issue a permanent injunction restraining and enjoining defendants, and each of them, from continuing the following unauthorized and unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Parish Ordinance 21-60 by seizing magazines or books in the custody of plaintiffs;
- (B) Enforcing or executing St. Bernard Parish Ordinance 21-60 by arresting plaintiffs or plaintiffs' employees under color of authority of the said Ordinance;
- (C) Retaining in their possession and not returning the books and magazines previously seized by defendants;
- (D) In the alternative, should St. Bernard Parish Ordinance 21-60 be held to be constitutional, plaintiffs pray that defendants

be permanently restrained from seizing magazines or books in plaintiff's possession while the said books or magazines are on the premises of newsstands, without first obtaining an appropriate warrant and after an appropriate adversary judicial proceeding;

(E) Continuing to prosecute plaintiff Ledesma in the criminal cases filed against him arising out of the aforementioned arrest.

(6) That judgment be rendered herein for damages in favor of plaintiffs and against defendants, Louis Reichart, George Bethea, and Earl Wendling, jointly, severally, and in solido on behalf of each plaintiff in the sum of \$30,000.00.

(7) That plaintiff have such other relief as may be appropriate under the circumstances together with the costs of this action.

Respectfully submitted,

(Signed) JACK PEEBLES
 JACK PEEBLES
 Attorney for Plaintiff
 4438 Gen. Pershing Street
 New Orleans, Louisiana 70125
 865-7163

STATE OF LOUISIANA
PARISH OF ORLEANS

AUGUST M. LEDESMA, JR., being first duly sworn upon oath, deposes and says: That he is one of the plaintiffs in the above entitled matter, that he has read the foregoing Complaint and that it is true as he verily believes.

(Signed) AUGUST M. LEDESMA, JR.
AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 15th DAY OF FEBRUARY, 1969.
/s/ ADOLPH J. LEVY
NOTARY PUBLIC

(Certificate of Service omitted)

PLAINTIFF'S EXHIBIT A

The property listed below was taken from Mr. August M. Ledesma, Jr. W/M 34, residing at 1707 Agriculture St. New Orleans, La. who was arrested from the B & B address as noted below.

Monday, January 27, 1969
9:45 P.M.

Charge with Parish Ordinance # 21-60
Section 6 and R.S. 14:106 Article, Paragraph 2 & 3.

The following is a list of books taken from the B & B Bookstore at 7403 N. Claiborne Ave., Arabi, La.:

	Informal Nudist	\$2.50
	Nudist Adventure	\$2.50
	Weekend Nudist	\$2.50
	Nakes Ego	\$2.50
	Sun Buffs	\$2.50
	Weekend Nudist	\$2.50
	Nudist Adventure	\$2.50
	Sunrise 15	\$2.50
	Nudist Adventure	\$2.50
	Scam	\$2.50
	Naked Films	\$2.50
	Naked Love	\$2.50
	Female Figure Studies (Book 3)	\$3.00
	Female Figure Studies (Book 4)	\$3.00
	Teenage Nudist	\$3.00
	Film & Figure	\$3.00
	Teenage Nudist	\$3.00
	Arcadia	\$3.00
	Jaybird Happening	\$3.00
	Arcadia	\$3.00
	The Wild Cats	\$3.00
	1969 Beauty Calendar	\$3.00
TOTAL	Weekend Jaybird	\$3.00
	Dolls & Dolls	\$3.00
	Arcadia	\$3.00
45 BOOKS	Sweden	\$3.50
	Skin Game	\$3.50
	'69 Nudies	\$3.50
	Skin Game	\$3.50
	Skin Game	\$3.50

Denmark	\$3.50
Nudism Tody	\$2.00
Sundial 44	\$2.00
'69 Naked Calendar	\$2.00
Chapagne	\$2.00
Spread Eagle	\$5.00
The Three Little Bares	\$5.00
Fancy Pants	\$5.00
Exclusive	\$5.00
The Three Little Bares	\$5.00
Spread Eagle	\$5.00
Twin Pak	\$4.00
Zinger	\$4.00
Sensation	\$4.00
Twin Pak	\$4.00
1-deck playing cards-Honey brand	\$1.50
1-deck playing cards- Palygirl brand	\$1.50
2-decks playing cards- Gaiety Brand @1.50	\$3.00
1-\$5.00 bill of currency Serial #C47637359A	\$5.00
1-\$5.00 bill of currency Serial #F74735575A	\$5.00

Received by:
Capt.
L. Reichard

MOTION FOR PRELIMINARY INJUNCTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Feb. 17, 1969

Now come Plaintiffs, August M. Ledesma, Jr., Harold J. Speiss, and Lawrence P. Pittman, who move the Court for a Preliminary Injunction enjoining Defendants, and each of them, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

- 1) From future enforcement of St. Bernard Parish Ordinance 21-60, in any manner against the Plaintiffs or their employees, in pending or future cases, or from issuing or causing the issuance of any Complaint, Warrant, or of arrest or Summons based upon an alleged violation of the said Ordinance;
- 2) From engaging in any other conduct which might in any way interfere with the keeping for sale or selling of material which is protected by the free speech and press provisions of the First and Fourteenth Amendments to the United States Constitution;

- 3) From seizing books, magazines or other publications or from engaging in any conduct which might in any way interfere with the keeping for sale or selling of material by Plaintiffs without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper Warrant.
- 4) From prosecuting Plaintiff August M. Ledesma, Jr. in cases numbered 17-085 through 17-088 in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana.
- 5) From retaining in their possession and not returning to Plaintiffs the publications seized at Plaintiffs' newsstand on January 27, 1969.
- 6) From interfering with Plaintiffs' sale of the publications seized at Plaintiffs' newsstand on January 27, 1969.

If Defendants are not so ordered and enjoined, immediate irreparable harm will result to Plaintiffs, and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law as shown by their Memorandum and Complaint. If this Preliminary Injunction be

granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

MOTION FOR TEMPORARY RESTRAINING ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Feb. 17, 1969

Plaintiffs, August M. Ledesma, Jr., Harold J. Speiss and Lawrence P. Pittman, move the Court for a Temporary Restraining Order, enjoining Defendants, Louis Reichart, George Bethea, and Earl Wendling, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

From seizing books, magazines, or other publications under color of authority of LSA-R.S. 14:106 or Ordinance No. 21-60 of the Parish of

St. Bernard, State of Louisiana, or from engaging in any conduct which might in any way interfere with the keeping for sale or selling of material by Plaintiffs, without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper Warrant of Search, Seizure, or Arrest.

Plaintiffs further move that the Court temporarily restrain the prosecution of Plaintiff August M. Ledesma, Jr. for obscenity in the Twenty-Fifth Judicial District Court, resulting from his arrest on January 27, 1969, by Defendants.

If Defendants are not so ordered and enjoined immediately, irreparable harm will result to Plaintiffs and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law as shown by their Complaint and Affidavit. If this Temporary Restraining Order be granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable.

The undersigned counsel for Plaintiff has advised Mr. Charles Livaudais, Assistant District Attorney for the Parish of St. Bernard, that an attempt would be made to obtain this Temporary Restraining Order; the said Charles Livaudais has been notified of the time and place that this matter would be presented to the Court, and has been provided with copies of the pleadings herein.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, ADOLPH J. LEVY, the undersigned authority, a Notary Public, duly qualified, commissioned and sworn, in and for the Parish of Orleans, State of Louisiana, personally came and appeared:

AUGUST M. LEDESMA, JR., who, upon being first duly sworn, did depose and say:

That he is a resident of the Parish of Orleans, State of Louisiana, and presently resides at 1707 Agriculture Street, New Orleans, Louisiana;

That he is a partner with Lawrence P. Pittman and Harold J. Speiss, and as partners they are proprietors of and owners of the Broad Bruxelles Seafood and News Center #3, a newsstand located at 7403 North Claiborne Avenue in the Parish of St. Bernard, State of Louisiana; the principal business of the said newsstand is the retail selling of magazines, newspapers, and books to the public;

That on January 27, 1969, at approximately 8:30 P. M., he was arrested at the aforementioned newsstand by Captain Louis Reichart, and Deputy George Bethea, and Deputy Earl Wendling, of the Sheriff's Office for the Parish of St. Bernard; that he was booked by the aforementioned Police Officers and later charged with violating LSA-R.S. 14:106 and St. Bernard Parish Ordinance No. 21-60, as a result of the display and/or possession of magazines and books at the aforementioned newsstand; at the time of affiant's aforementioned arrest, many publications, including books and magazines, were seized at the aforementioned newsstand by the arresting Officers;

The aforementioned Police Officers further threatened to prosecute affiant if he did not remove remaining copies of the seized magazines from the premises of the newsstand;

The arrest and seizure occurred without an adversary judicial hearing having been first held on the question of the obscenity of the publications involved, and without affiant having been presented with a Search or Arrest Warrant;

That, as a result of the aforementioned arrest, seizures, and threats, affiant was compelled to and did in fact remove many magazines and publications from display and sale at the aforementioned newsstand, and said arrest, seizures, and threats have interfered with his business and trade relations and have deprived him of his rights to freedom of speech and press;

That affiant verily believes that the conduct of the
aforementioned defendants will continue to affiant's
irreparable damage unless defendants are enjoined
by this Court.

(Signed) AUGUST M. LEDESMA, JR.
AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 15th DAY OF FEBRUARY, 1969.
/s/ ADOLPH J. LEVY
NOTARY PUBLIC

MOTION AND ORDER TO AMEND COMPLAINT

In the United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Mar. 11, 1969

Plaintiffs, through undersigned counsel, and upon
suggesting to the court that defendants have not filed
an Answer herein, move to amend their original Com-
plaint filed herein in the following particulars:

1. By striking paragraph "XXIV" and substituting
the following in its place:

"LSA-R.S. 14:106 is unconstitutional on its face and as applied in this case for the same reasons alleged herein regarding St. Bernard Parish Ordinance No. 21-60. Plaintiffs desire that this Court enter a declaratory judgment under the provisions of 28 U.S.C. 2201, declaring St. Bernard Parish Ordinance 21-60 and LSA-R.S. 14:106 to be in violation of the Constitution of the United States, and Plaintiffs further desire that under the same authority this Court declare any application of the aforementioned Ordinance or Statute to the sale of magazines and books in public newsstands to be unconstitutional. Plaintiffs further desire that this Court declare the aforementioned arrest of Plaintiff Ledesma, which occurred in the absence of a warrant or prior adversary judicial hearing, to be unconstitutional."

2. By striking paragraph "XXVII" and substituting the following in its place:

"The foregoing Statute and Ordinance purport to regulate freedom of expression. The patent unconstitutionality of the said Statute and Ordinance justifies and requires Federal equitable relief from State criminal prosecution."

3. By striking paragraph "XXVIII" and substituting the following in its place:

"As a result of the aforementioned, Plaintiffs are entitled to a declaratory judgment declaring the said Statute and Ordinance to be unconstitutional. Plaintiffs are further entitled to damages, and an injunction, restraining and enjoining Defendants, and persons in

active concert or participation with them, from continuing the following unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 or LSA - R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;
- (B) Alternatively, should the said Ordinance or Statute be held constitutional, by enforcing the said Ordinance or Statute through the making of searches, seizures, or arrests without first obtaining a lawful warrant and conducting an adversary judicial proceeding."

4. By striking the Prayer and substituting in its place the Prayer of this Amendment.

WHEREFORE, Plaintiffs pray:

- (1) That this Amendment be allowed;
- (2) That a Temporary Restraining Order issue immediately from this Court, restraining Defendants herein from seizing magazines or books in the possession of Plaintiffs while the said magazines or books are on the premises of newsstands open to the public within the Parish of St. Bernard, State of Louisiana, without first obtaining an appropriate warrant of search, seizure, or arrest, and after an appropriate adversary judicial proceeding;

(3) That in due course a Declaratory Judgment be entered herein declaring St. Bernard Ordinance 21-60 and LSA-R.S. 14:106 to be unconstitutional, or in the alternative, that this Court declare any application of the said Statute or Ordinance to the public exhibition or sale of magazines and books to be unconstitutional;

(4) That this Court issue a Preliminary and Permanent Injunction restraining and enjoining Defendants from continuing the following unlawful acts, to-wit:

- (A) Enforcing or executing St. Bernard Ordinance No. 21-60 or LSA-R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;
- (B) Alternatively, should the said Ordinance or Statute be held constitutional, by enforcing the said Ordinance or Statute through the making of searches or seizures of books or magazines, or making arrests based upon the possession or sale of books or magazines, without first obtaining a lawful warrant and conducting an adversary judicial proceeding;
- (C) Retaining in their possession and not returning the books, magazines, and other publications previously seized by Defendants from the Broad Bruxelles Seafood and Newscenter # 3;

(D) Continuing to prosecute Plaintiff Ledesma in the criminal cases filed against him arising out of his aforementioned arrest;

(5) That judgment be rendered herein for damages in favor of Plaintiffs and against Defendants Louis Reichart, George Bethea, and Earl Wendling, jointly, severally, and in solido on behalf of each Plaintiff in the sum of THIRTY THOUSAND DOLLARS (\$30,000.-00);

(6) That this Court convene for the purpose of hearing and determining this Application for Declaratory Judgment and Permanent Injunction, a Statutory Court of three Judges, at least one of whom shall be a Circuit Judge, in accordance with the provisions of Sections 2281 and 2284, Title 28, United States Code.

(7) That Plaintiffs have such other relief as may be appropriate under the circumstances together with the costs of this action.

(Signed) JACK PEEBLES
 JACK PEEBLES
 Attorney for Plaintiffs
 4438 Gen. Pershing Street
 New Orleans, Louisiana 70125
 865-7163

ORDER

The foregoing Motion to Amend Complaint considered, and it appearing that no responsive pleading has been filed in answer to the said Complaint;

IT IS ORDERED that Plaintiffs' Complaint be amended in the particulars prayed for.

New Orleans, Louisiana, this 12th day of March, 1969.

(Signed) FREDERICK J. R. HEEBE
JUDGE

(Certificate of Service omitted)

United States District Court
Eastern District of Louisiana
New Orleans Division
March 15, 1969

CLERK'S OFFICE

New Orleans, La.

(Title omitted in printing)

Jack Peebles, Esq., 4438 Gen. Pershing St., N.O., La.

Attorneys for Parties:

In accordance with Rule 77(d) of the Federal Rules of Civil Procedure, you are hereby notified that the

Court (Judge Frederick J. R. Heebe) has on 3/12/69 rendered an order that Plaintiff's Complaint be amended, etc. Ent. 3/15/69.

Very truly yours,

A. DALLAM O'BRIEN, JR.,
CLERK

(Signed) NELSON B. JONES
Chief Deputy Clerk

ANSWER ON BEHALF OF LOUIS REICHERT,
GEORGE BETHEA AND EARL WENDLING

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Mar. 24, 1969

Now into Court comes the defendants, Louis Reichert, George Bethea and Earl Wendling and for answer to the complaint of the petitioners aver that:

FIRST DEFENSE

The complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction in that the amount in the civil matter does not exceed the statutory requirements.

THIRD DEFENSE

Defendants answer the complaint as follows:

1.

For want of sufficient information to justify belief, Paragraph 1 is denied.

2.

Defendants admit their names and status as outlined in Paragraph 2.

3.

Paragraph 3 of the complaint is denied.

4.

Paragraph 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

6.

Defendants deny Paragraph 6 of the complaint except to admit that defendants were acting under a valid statute of the State of Louisiana and the Parish of St. Bernard in the regular performance of their duties.

7.

Defendants deny that any raid was committed as outlined in Paragraph 7 of the complaint and admit that plaintiff, August M. Ledesma, Jr. was arrested in violation of the statutes as enumerated. And, admit that certain publications were taken as evidence from the establishment incident to the arrest.

8.

Defendants have no right or authority to institute criminal prosecution and deny the remainder of Article 8 of the complaint.

9.

Defendants admit that certain publications were taken incident to the arrest and deny the remainder of Paragraph 9 of the complaint.

10.

Paragraph 10 of the complaint is denied, defendants further stating that a search warrant was not required as the pamphlets taken were taken incident to the arrest.

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11.

Paragraph 11 of the complaint is denied.

12.

Paragraph 12 of the complaint is denied.

13.

Paragraph 13 of the complaint is denied.

14.

Paragraph 14 of the complaint is denied.

15.

For want of sufficient information to justify belief
Paragraph 15 is denied.

16.

Paragraph 16 of the complaint is denied.

17.

Paragraph 17 of the complaint is denied.

18.

Paragraph 18 of the complaint is denied.

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19.

Defendants admit that they acted in good faith under valid constituted statute and deny the remainder of Paragraph 19 of the complaint.

20.

Paragraph 20 of the complaint is denied.

21.

Paragraph 21 of the complaint is a legal conclusion and requires no answer.

22.

Paragraph 22 of the complaint is denied.

23.

Paragraph 23 is denied.

24.

Paragraph 24 of the complaint is denied.

25.

Paragraph 25 requests admissions of public records and said public records are the best evidence of themselves.

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26.

Paragraph 26 is denied.

27.

Paragraph 27 of complaint is denied.

28.

Paragraph 28 of the complaint is denied.

FOURTH DEFENSE

Defendants aver that they acted in good faith under a valid constituted statute that they believe to be valid and constitutional.

WHEREFORE, defendants demand judgment in their favor and against plaintiffs, rejecting plaintiffs' claims with costs.

CRONVICH & WAMBSGANS
3714 Airline Highway
Metairie, La. 834-8866,
Attorneys for Defendants
Louis Reichert, George Bethea
and Earl Wendling

(Signed) A. W. WAMBSGANS

A. W. WAMBSGANS

(Signed) ROBERT I. BROUSSARD

ROBERT I. BROUSSARD

848 Second St. Gretna, La.

361-3185

(Certificate of Service Omitted)

UNITED STATES COURT OF APPEALS

Fifth Circuit

March 19, 1969

John R. Brown

Chief Judge

Houston, Texas 77002

Mr. A. Dallam O'Brien, Clerk

Eastern District of Louisiana

Room 306, 400 Royal Street

New Orleans, Louisiana 70130

C.A. No. 69-322, August M.

Ledesma, Jr., et al v. Leander

H. Perez, Jr., et al

My dear Mr. O'Brien:

In view of the fact that this case raises identical questions as in C.A. No. 68-1927, Delta Book Distributors, Inc., et al. v. Alwynn J. Cronvich, et al., Judge Heebe is relieved of this case with his consent and Judge Boyle is substituted as the Requesting Judge. I have constituted the Court in accordance with the enclosed designation order which I request you to file. I also enclose the complaints, in reference to this matter, which were sent to me by Judge Heebe.

Copies of this order are being sent to the Judges.

Sincerely yours

erb

2 Encl.

cc: Honorable John M. Wisdom

Honorable Frederick J. R. Heebe

Honorable Edward J. Boyle, Sr.

Honorable Alvin B. Rubin

DESIGNATION OF JUDGES BOYLE, SR., RUBIN &
WISDOM TO CONSTITUTE 3-JUDGE COURT

In the United States District Court
for the Eastern District of
Louisiana

(Title omitted in printing)

Filed: Mar. 24, 1969

(1) Requesting Judge: Honorable Edward J. Boyle,
Sr., Eastern District of Louisiana

(2) District Judge: Honorable Alvin B. Rubin
Eastern District of Louisiana

(3) Circuit Judge: Honorable John M. Wisdom

(4) Date of Order: March 19, 1969

The Requesting Judge (1) above named to whom an
application for relief has been presented in the above

cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be afforded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See *Jackson v. Choate*, 5 Cir., 1968, 404 F.2d 910, [Misc. No. 1071, Nov. 29, 1968], *Jackson v. Department of Public Welfare of the State of Florida*, S.D. Fla., 1968, ____ F. Supp. ____; *Smith v. Ladner*, S.D. Miss., 1966, 260 F. Supp. 918.

(Signed) JOHN R. BROWN
JOHN R. BROWN
Chief Judge
Fifth Circuit

**PLAINTIFFS' AMENDED MOTION FOR PRE-
LIMINARY INJUNCTION**

**United States District Court
Eastern District of Louisiana
New Orleans Division**

(Title omitted in printing)

Filed: Mar 11, 1969

Plaintiffs August M. Ledesma, Jr., Harold J. Speiss, and Lawrence P. Pittman, amend their Motion for Preliminary Injunction which they have previously filed herein, and move that a Statutory Court of three judges issue a Preliminary Injunction of enjoining Defendants, and each of them, and their agents, servants, employees and attorneys, and all persons in active concert or participation with them:

1) From enforcing or executing St. Bernard Ordinance No. 21-60 or LSA-R.S. 14:106 by arresting Plaintiffs or seizing Plaintiffs' publications or prosecuting Plaintiffs under color of authority of said Ordinance or Statute;

2) From seizing books, magazines or other publications or from engaging in any conduct, including arresting Plaintiffs, which might in any way interfere with the keeping for sale or selling of material by Plaintiffs without first obtaining a judicial determination, after adversary proceedings, concerning the obscenity of the material, and after the issuance of a proper warrant.

3) From prosecuting Plaintiff August M. Ledesma, Jr. in cases numbered 17-085 through 17-088 in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana.

4) From retaining in their possession and not returning to Plaintiffs the publications seized at Plaintiffs' newsstand on January 27, 1969.

If Defendants are not so ordered and enjoined, immediate irreparable harm will result to Plaintiffs, and Plaintiffs will be deprived of rights secured to them by the First Amendment to the United States Constitution, as more particularly described in Plaintiffs' Complaint and Affidavit filed herein. Plaintiffs have no adequate remedy at law. If this Preliminary Injunction be granted, the injury, if any, to Defendants herein, if final judgment be in their favor, will be inconsiderable.

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

(Certificate of Service omitted)

Minute Entry
March 27, 1969
BOYLE, J.

(Title omitted in printing)

IT IS ORDERED that a conference be, and it is hereby, set for Wednesday, April 2, 1969, at 4:00 P.M., in the captioned cause.

(Certificate of Service omitted)

PLAINTIFFS' MOTION TO AMEND COMPLAINT

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 6, 1969

Plaintiffs move to amend their Complaint filed herein for the following reasons:

I.

Since the filing of this action, defendant Leander H. Perez, Jr. has filed all of the magazines and other publications which were seized from plaintiffs into evidence in the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana. By such

action, the said publications entered the custody of the Clerk of the said Court. Consequently, the said Clerk must be made a party-defendant herein in order for this court to effectively assert jurisdiction over the said publications.

II.

Therefore, plaintiffs move to amend their Complaint by adding as a defendant: SIDNEY D. TORRES, individually and as Clerk of Court of the Twenty-Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana, and further move to amend their Complaint by adding the following paragraph "XXIX":

"Defendant Sidney D. Torres is Clerk of the Twenty Fifth Judicial District Court for the Parish of St. Bernard, State of Louisiana. He received from the aforementioned defendants and now has in his custody and possession the magazines and other publications seized in the raid complained of by plaintiffs herein. He will not release the said magazines and other publications to plaintiffs."

WHEREFORE, Plaintiffs pray that this Amendment be allowed and that in due course judgment be rendered as prayed for in the Complaint and First Amended Complaint filed herein, except that there be no judgment for damages rendered against Sidney D. Torres.

Respectfully submitted,

(Signed) JACK PEEBLES
JACK PEEBLES
Attorney for Plaintiffs
4438 Gen. Pershing Street
New Orleans, Louisiana 70125
865-7163

ORDER

IT IS ORDERED that Plaintiffs' Motion to Amend Complaint be granted and the Complaint is amended in all particulars prayed for by the plaintiffs.

New Orleans, Louisiana, this 8th day of April, 1969.

(Signed) EDW. J. BOYLE, SR.
JUDGE

(Certificate of Service omitted)

Minute Entry
April 15, 1969
WISDOM, J.
BOYLE, J.
RUBIN, J.

(Title omitted in printing)

IT IS ORDERED that the Three-Judge Court hearing on plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction and on the merits of this

cause be, and it is hereby, set for Monday, April 21, 1969, at 2:00 P.M.

(Certificate of Service omitted)

Minute Entry
 April 15, 1969
 WISDOM, J.
 BOYLE, J.
 RUBIN, J.

(Title omitted in printing)

In conference held this day with counsel for the parties in this cause it was agreed that:

1. A consolidated Three-Judge Court hearing on plaintiffs' Motions for Temporary Restraining Order and Preliminary Injunction and on the merits be set for Monday, April 21, 1969 at 2:00 P.M. in Room 416, 400 Royal Street, New Orleans, Louisiana.
2. All evidence required for adjudication of all issues shall be presented by stipulations of facts and affidavits, unless the Court determines on hearing that oral testimony of witnesses is desired.
3. The issue of damages prayed for shall be served.
4. Answer shall be forthwith filed by the defendant Honorable Leander H. Perez, Jr.

5. The Honorable Leander H. Perez, Jr., District Attorney for the 25th Judicial District, Parish of St. Bernard, State of Louisiana, would cause the trials in State of Louisiana v. August M. Ledesma, Jr., Nos. 17-085 and 17-086 of the docket of the 25th Judicial District Court for the Parish of St. Bernard, State of Louisiana, now set for April 21, 1969, to be continued to April 28, 1969.

(Certificate of Service omitted)

STIPULATION OF FACTS FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: April 21, 1969

All parties stipulate, that, for the purposes of the Hearing on the Motion for Preliminary Injunction only, the following facts are true:

1.

Plaintiffs are the owners and operators of a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad-Bruxelles Seafood and News Center No. 3 and were so on January 27, 1969.

Leander H. Perez, Jr. is the duly elected District Attorney for the 25th Judicial District of the State of Louisiana, embodying the Parishes of St. Bernard and Plaquamines, Louis L. Reichart, George Bethea and Earl Wendling are law officers of the Sheriff's Office of the Parish of St. Bernard and were so on January 27, 1969. Throughout this entire occurrence all of the defendants were acting in their above stated official capacities.

On January 27, 1969, at approximately 9 o'clock P.M. defendants Reichart, Bethea and Wendling arrested plaintiff August M. Ledesma, Jr. at the Broad-Bruxelles Seafood and News Center No. 3 at Arabi, St. Bernard Parish, Louisiana, and booked him with Violation of Louisiana Revised Statute Title 14:106 and St. Bernard Parish Police Jury Ordinance 21-60, relative to Obscenity. Prior to the arrest defendant Wendling had purchased two publications from plaintiff Ledesma and defendant Leander H. Perez, Jr. has filed Bills of Information before the 25th Judicial District Court for the Parish of St. Bernard, said Bills being based upon the aforementioned sale to Wendling. At the same time that plaintiff Ledesma was arrested on January 27, 1969 defendants Reichert, Bethea and Wendling took from plaintiff's establishment certain publications and playing cards listed on document "Stipulation-1", attached hereto, and defendant Leander H. Perez, Jr. has filed Bills of Information against plaintiff Ledesma in the 25th Judicial District Court for the Parish of St. Bernard, said Bills being based upon plaintiff's possession and exhibition of the aforementioned publications and playing cards.

No warrant of anykind had been obtained by defendants prior to the arrest of Ledesma on January 27, 1969, and no prior adversary judicial hearing had been held, and no judicial scrutiny by any judge or magistrate was made, relative to the nature of the publications and playing cards prior to the arrest.

No other publications or items have been taken from plaintiffs established by defendant, other than those listed on exhibit "Stipulation - 1".

Defendant Leander H. Perez, Jr. has entered a Nolle Prosequi in each one of the Bills of Inforcation relative to Violations of the St. Bernard Parish Police Jury Ordinance. The remaining two cases relative to Violations of the State Statute are pending trial.

Plaintiffs are still actively engaged in their business of selling publications, food and other items at their establishment in question herein except; however, they are no longer selling the same type of magazines and playing cards in question herein.

Respectfully submitted,

LEANDER H. PEREZ, JR.,
DISTRICT ATTORNEY AND
CHARLES H. LIVAUDAIS,
ASSISTANT DISTRICT
ATTORNEY

(Signed) CHARLES H. LIVAUDAIS
CHARLES H. LIVAUDAIS

A. W. WAMBSGANS,
3714 Airline Highway,
Metairie, Louisiana
Attorney for Defendants.

(Signed) JACK PEEBLES
JACK PEEBLES,
4428 General Pershing Street,
New Orleans, Louisiana
Attorney for Plaintiff.

The property listed below was
taken from Mr. August M. Ledesma, Jr.
W M 34, residing at 1707 Agriculture St.
New Orleans, La. who was arrested from
the B & B address as noted below.

Monday, January 27, 1969
9:45 P.M.

Charge with Parish Ordinance # 21-60
Section 6 and R.S. 14:106 Article, Paragraph 2 & 3.

The following is a list of books taken
from the B & B Bookstore at 7403 N.
Claiborne Ave, Arabi, La.:

Informal Nudist	\$2.50
Nudist Adventure	\$2.50
Weekend Nudist	\$2.50
Nakes Ego	\$2.50

	Sun Buffs	\$2.50
	Weekend Nudist	\$2.50
	Nudist Adventure	\$2.50
	Sunrise 15	\$2.50
	Nudist Adventure	\$2.50
	Scam	\$2.50
	Naked Films	\$2.50
	Naked Love	\$2.50
	Female Figure Studies (Book 3)	\$3.00
	Female Figure Studies (Book 4)	\$3.00
	Teenage Nudist	\$3.00
	Film & Figure	\$3.00
	Teenage Nudist	\$3.00
	Arcadia	\$3.00
	Jaybird Happening	\$3.00
	Arcadia	\$3.00
	The Wild Cats	\$3.00
	1969 Beauty Calendar	\$3.00
TOTAL	Weekend Jaybird	\$3.00
	Dolls & Dolls	\$3.00
	Arcadia	\$3.00
45 BOOKS	Sweden	\$3.50
	Skin Game	\$3.50
	'69 Nudies	\$3.50
	Skin Game	\$3.50
	Skin Game	\$3.50
	Denmark	\$3.50
	Nudism Today	\$2.00
	Sundial 44	\$2.00
	'69 Naked Calendar	\$2.00
	Chapagne	\$2.00
	Spread Eagle	\$5.00
	The Three Little Bares	\$5.00
	Fancy Pants	\$5.00

Exclusive	\$5.00
The Three Little Bares	\$5.00
Spread Eagle	\$5.00
Twin Pak	\$4.00
Zinger	\$4.00
Sensation	\$4.00
Twin Pak	\$4.00
1-deck playing cards-Honey brand	\$1.50
1-deck playing cards- Palygirl brand	\$1.50
2-decks playing cards- Gaiety Brand @1.50	\$3.00
1-\$5.00 bill of currency Serial #C47637359A	\$5.00
1-\$5.00 bill of currency Serial #F74735575A	\$5.00

Received by:
A. M. LEDESMA, JR.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

LOUIS L. REICHERT
who, after being duly sworn, did depose and say:

That I had been employed as a law enforcement of-
ficial for more than Twenty-Three (23 Years; that on

January 27, 1969 I had occasion to participate in an arrest of one August M. Ledesma, Jr., relative to violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance No. 21-60, relative to Obscenity; that on numerous occasions prior to the date of the said arrest I had had conferences with and been instructed by my employer, Sheriff John F. Rowley, concerning the obscenity of publications being displayed and sold at the Broad-Bruxelles Seafood and News Center No. 3, owned and operated by August M. Ledesma, Jr.; that I, together with Sheriff Rowley and other law enforcement officials had examined publications which had been purchased from Ledesma's establishment, and that Sheriff Rowley had instructed me in the method of determining whether or not a publication was obscene and obscene under the law, that on the night of the arrest I and Duputies George Bethea and Earl Wendling had been instructed by the Sheriff to proceed to Ledesma's establishment to examine it for violations of the law relative to obscenity; that prior to the arrest both I and Deputy Wendling had purchased books from Ledesma, all of which were obscene according to the instructions I had received from Sheriff Rowley; and, that in addition to the books purchased I and Deputy Bethea and Wendling took from defendant's establishment, approximately Forty-Five (45) other publications and playing cards which were on display to the public, and which were obviously obscene and in violation of the law; that Ledesma had in his possession approximately Three Hundred (300) or more similar publications which were not taken as evidence, and after which Ledesma retained in his possession; that I, deponent, allowed Ledesma to call his attorney,

and also to call an associate; that we three in the store, waited approximately Twenty-Five (25) minutes for the associate to come and operate the business while we took Ledesma to the parish prison to be booked; that I at no time closed down Ledesma's business operation; nor did I instruct Ledesma to close his business or dispose of any of his publications; that since the arrest on January 27, 1969, I, deponent have received evidence sufficient to charge Ledesma additionally with sales and exhibition of obscene publications to, and in the presence of, juveniles, but have not made the charges yet upon the advice of the District Attorney that I should wait until the determination by the Federal Court of the case presently pending.

(Signed) LOUIS L. REICHERT
LOUIS L. REICHERT

Sworn to and Subscribed before
me, Notary Public, at Chalmette,
Louisiana, this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

GEORGE BETHEA

who, after being duly sworn, did depose and say:

THAT I am a Deputy Sheriff for the Parish of St. Bernard, and as such assisted in the arrest of one August M. Ledesma, Jr. on January 27, 1969, relative to Violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance 21-60; that on numerous occasions prior to the arrest I had been counselled and instructed by Sheriff John F. Rowley concerning the requirements for determining the obscenity of publications; that I and the Sheriff had revised numerous publications which had been purchased from Ledesma's establishment prior to the arrest; that all of the publications which were bought and taken as evidence incidental to the arrest were visible to the public eye on the night of the arrest; that I have received evidence of sales to, and in the presence of, juveniles of obscene publications sold by Ladesma and his associates, but I have not made charges at present, upon the advice of the District Attorney pending the outcome of the suit in Federal Court; that at no time have I attempted to close down Ledesma's establishment; nor have I instructed Ledesma to dispose of any publications; that I was present during the entire occurrence of the arrest

of Ledesma and that neither Louis Reichert nor Deputy Wandling instructed Ledesma to dispose of any publications or close his business; that instead the deputies waited for approximately Twenty-Five (25) minutes for Ledesma's associate to come operate the business while Ledesma was being booked; furthermore, that I and Louis Reichert and Earl Wendling left approximately Three Hundred (300) more obscene publications in Ledesma's establishment, having taken only approximately Forty-Five (45) publications and playing cards which we felt were sufficient for the case.

(Signed) GEORGE BETHEA
GEORGE BETHEA

Sworn to and Subscribed
Before Me, Notary Public,
at Chalmette, Louisiana,
this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

EARL WENDLING

who, after being duly sworn, did depose and say:

THAT I am a Deputy Sheriff for the Parish of St. Bernard, and as such assisted in the arrest of one August M. Ledesma, Jr. on January 27, 1969 relative to Violation of Louisiana Revised Statutes Title 14 Section 106 and St. Bernard Parish Police Jury Ordinance 21-60; that on numerous occasions prior to the arrest I had been counselled and instructed by Sheriff John F. Rowley concerning the requirements for determining the obscenity of publications; that I and the Sheriff had reviewed numerous publications which had been purchased from Ledesma's establishment prior to the arrest; that all of the publications which were bought and taken as evidence incidental to the arrest were visible to the public eye on the night of the arrest; that I have received evidence of sales to, and in the presence of, juveniles of obscene publications sold by Ledesma and his associates, but I have not made charges at present, upon the advice of the District Attorney pending the outcome of the suit in Federal Court; that at no time have I attempted to close down Ledesma's establishment; nor have I instructed Ledesma to dispose of any publications; that I was present during the entire occurrence of the arrest of Ledesma and that neither Louis Reichert nor George Bethea instructed Ledesma to dispose of any publications or close his business; that instead the deputies waited for approximately Twenty-Five (25) minutes for Ledesma's associate to come operate the business while Ledesma was being booked; furthermore, that I and Louis Reichert and George Bethea left approximately Three Hundred (300) more obscene publica-

tions in Ledesma's establishment, having taken only approximately Forty-Five (45) publications and playing cards which we felt were sufficient for the case.

(Signed) EARL WENDLING
EARL WENDLING

Sworn to and Subscribed
before me, Notary Public,
this 21st day of
April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

JOHN M. DARSAM
who, after being duly sworn, did depose and say:

On March 29, 1969 at approximately 10:45 A.M., I
and Herman Burkhardt, aged 16 years, entered B & B
Bookstore and walked behind a counter which is lo-
cated on your right as you enter the book store. There
is a sign which says "No one admitted under 18 years of
age." Both of us went behind the counter and looked at

several books before we picked up the two books we wanted. We each picked out one book apiece. I picked up *A Report on Teenage Prostitutes* by Russ Trainer, purchase price \$1.25 and Herman Burkhardt picked out *Sex in Eden* by A. J. Davis, purchase price \$1.25. We were in the store approximately 5 or 10 minutes when we went up to the counter to pay for the books. I gave the man a \$5.00 bill and he gave me the change. Herman had a \$10.00 bill which he handed to the man and he asked him how old he was and when Herman told him that he was 16 years old the man said that he couldn't sell him the book. Then I asked the man, "Could I purchase the book for him?" and he said "Yes", and the man picked up the \$10.00 off of the counter where Herman had put it and he gave me the change for the \$10.00. Herman picked up the bag which contained both books and walked out the store with both books. At no time while we were in the store were we ever asked to get from behind the counter or were was asked for our ages.

On April 1, 1969 at approximately 7:50 P.M. Herman Burkhardt and I again went to the B & B Bookstore. We entered the store and headed for the counter where we had purchased the books the last time. This time the man stopped us and asked for identification and he told Herman, "No, son, you are not allowed behind the counter", and I went back of the counter and picked out *Flesh for Hire* by Stacy Raymond-Taylor, purchase price \$1.25 and I walked back to the counter where Herman was standing and Herman asked me if I could buy a book for him like I did before, and the man answered, "Yes", that I could purchase one. Then Herman pointed to the book he wanted and the man

pointed to one next to it and Herman said, "No, one book to the left", and the man picked up the book and he put the book on the counter in front of Herman. The title of the book was *Passion Party* by Les King, purchase price 75¢. Herman pulled a \$10.00 bill out of his pocket and put it on the counter. The man took the \$10.00 bill and pointed to me and said, "You are purchasing this book", and he gave me Herman's change. I gave the man two \$1.00 bills for my book and the man put the books in separate bags. The man put Herman's book in a white paper bag and mine in a brown paper bag. Herman picked up both books and walked out and I walked out with Herman's change.

We both walked out of the place without any questions being asked of us.

(Signed) JOHN M. DARSAM
JOHN M. DARSAM

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

EDWARD J. MANUEL, JR.

who, after being duly sworn, did depose and say:

On Thursday, March 13, 1969 I went to the B & B Bookstore with my father, Edward J. Manuel, Sr. and I was looking around at the books and I went behind the counter and was looking at all the books with pictures about sex. This was behind the sign that said "No one under the age of 18 allowed behind this sign." I kept on reading the books. I looked at the books at least four or five minutes. A customer walked in and the man who worked in the store came and whispered in my ear that he was sorry but I would have to get from behind the counter. My father was talking to the man who was running the store. We stood in there awhile and my daddy bought some crawfish and I got two comic books.

On Thursday, March 20, 1969 I again went to the B & B Bookstore with my father and again I went behind the counter and was looking at the sex books. No one stopped me. I was back there about 3 minutes when a man in a uniform walked in and the owner made a motion with his head and hand for me to get from behind the counter. My father bought me two comic books.

On Friday, March 21, 1969 we went back to the B & B Bookstore. The old man was running the place that night, and the store was quite busy. I went back of the counter and the old man saw me, but he didn't tell me anything at that time, he kept on with his work, and approximately 7 minutes later after I read a whole page in a book called *Sex Before 20*, when the man came up to me and said, "Kid, Can't you read the damn sign? Get behind the sign, boy." This wasn't the owner of the shop, it was somebody else. My father bought crawfish and crackers that night.

On Tuesday, March 25, 1969 we went to the B & B Bookstore again. I went straight in behind the counter. I had just got there when the owner came up and tapped me on the arm and told me to get back of the sign. After I got back of the sign, my daddy started talking to the man and after the other customers left, my daddy asked me what the name of the book was that my brother wanted, and I told him I know where it is and I went back of the counter and picked up the book. I don't remember the name of the book, but it had *For Adults Only*. The owner made me put the book down and he told me to get from behind the counter. That night he had two boys and one man in the place.

On Friday, March 28, 1969 we went back to the B & B Bookstore. When we went in there was the owner and one boy about 10 years of age in the store. My daddy went to the seafood counter and I followed him, and my father ordered 2 pounds of crawfish and while they were fixing the crawfish we went back to look at the books. My father picked up a book *Lesbian Love*, by

Jeanie Quin, Adults Only, purchase price \$1.95, and he asked me if that was the book I wanted, and I told him yes and he said for me to pay for it and I took the money out of my pocket. I took \$2.00 out of my pocket and the man asked me if I had 8¢ and I looked in my pockets and I never had change so I said, "Daddy, lend me 8¢ so I can pay for the book." And he said, "Excuse me, it was 3¢ and he gave me the 5¢ back. He started to hand me the book and then he handed it to my father. My father said, "It's your book, you paid for it. You take it." Then I walked out the store with the book in my hands.

A few minutes later my father walked out and we came on home.

At the time of these occurrences I was 14 years of age.

(Signed) EDWARD J. MANUEL, JR.
EDWARD J. MANUEL, JR.

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ [WALLACE P. ANSARDI]
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally came and appeared:

SHERIFF JOHN F. ROWLEY,
who, after being duly sworn, did depose and say:

That I am the duly elected Sheriff for the Parish of St. Bernard, State of Louisiana, that on January 27, 1969 Captain Louis E. Reichert and Deputies George Bethea and Earl Wendling of my office investigated the Broad-Bruxelles Seafood and News Center No. 3 at Arabi, Louisiana, relative to violations of Louisiana Revised Statutes Title 14:106 and St. Bernard Parish Police Jury Ordinance 21-60; that I am an attorney, and in my capacity as Sheriff instructed Captain Reichert and Deputies Bethea and Wendling on numerous occasions prior to the arrest, as to the legal requirements for determining obscenity of publications; that on these occasions I examined publications together with the said deputies, which publications had been purchased from Ledesma's establishment; that as Sheriff I have received numerous complaints from the citizens of St. Bernard Parish and including clergy from schools and churches within close walking distance of Ledesma's establishment, relative to the sale and distribution and exhibition of obscene publications; that Ledesma's business is still in full operation, and that although I, deponent have sufficient evidence to file additional charges against Ledesma for sale,

distribution and publication of obscene materials to, and in the presence of, minors, I have not yet done so upon the advice of the District Attorney pending the outcome of the Federal suit.

(Signed) JOHN F. ROWLEY
JOHN F. ROWLEY, SHERIFF
for the Parish of St. Bernard
Chalmette, Louisiana

Sworn to and subscribed before
me, Notary Public, this 21st
day of April, 1969.

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ST. BERNARD

BEFORE ME, the undersigned authority personally
came and appeared:

HERMAN R. BURKHARDT
who, after being duly sworn, did depose and say:

On March 29, 1969 at approximately 10:45 A.M., I and John Darsam, aged 21 years, entered B & B Bookstore and walked behind a counter which is located on your right as you enter the book store. There is a sign which says "No one admitted under 18 years of age." Both of us went behind the counter and looked at several books before we picked up the two books, we wanted.

We each picked out one book apiece. I picked up *Sex in Eden* by A. J. Davis, purchase price \$1.25, and John Darsam picked out *A Report on Teenage Prostitutes* by Russ Trainer, purchase price \$1.25. We were in the store approximately 5 or 10 minutes when we went up to the counter to pay for the books. John gave the man a \$5.00 bill and he gave John the change. I had a \$10.00 bill which I handed to the man and he asked me how old I was and when I told him that I was 16 years old the man said that he couldn't sell me the book. Then John asked the man, "Could I purchase the book for him?" and he said "Yes", and the man picked up the \$10.00 off of the counter where I had put it and he gave John the change for the \$10.00. I picked up the bag which contained both books and walked out the store with both books. At no time while we were in the store were we ever asked to get from behind the counter or were was asked for our ages.

On April 1, 1969 at approximately 7:50 P.M., John Darsam and I again went to the B & B Bookstore. We entered the store and headed for the counter where we had purchased the books the last time. This time the man stopped us and asked for identification and he told me, "No, son, you are not allowed behind the counter", and John went back of the counter and picked out *Flesh for Hire* by Stacy Raymond-Taylor, purchase price \$1.25 and then walked back to the counter where I was standing and I asked him if he could buy a book for me like he did before, and the man answered, "Yes", that he could purchase one. Then I pointed to the book I wanted and the man pointed to one next to it and I said, "No, one book to the left", and the man picked up the book and he put the book on the counter in front

of us. The title of the book was *Passion Party* by Les King, purchase price 75¢. I pulled a \$10.00 bill out of my pocket and put it on the counter. The man took the \$10.00 bill and pointed to John and said, "You are purchasing this book", and he gave John my change. John gave the man two \$1.00 bills for his book and the man put the books in separate bags. The man put my book in a white paper bag and John's book in a brown paper bag. I picked up both books and walked out and John walked out with my change.

We both walked out of the place without any questions being asked of us.

At the time of the occurrence I was 16 years of age.

s/ Herman R. Burkhardt
HERMAN R. BURKHARDT

Sworn to and subscribed before
me, Notary Public, at Chalmette, La.
this 21st day of April, 1969.

/s/ WALLACE P. ANSARDI
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: Jack Peebles, who, upon being duly sworn, according to law, did depose and say:

That he is an attorney at law, and on the evening of January 27, 1969 he went to the St. Bernard Parish Courthouse in Chalmette, Louisiana for the purpose of representing August M. Ledesma, Jr. regarding an arrest for obscenity made on that date;

That, while at the said courthouse, and while August M. Ledesma, Jr. was still in the custody of the St. Bernard Parish law enforcement officials, affiant heard a man who identified himself to affiant as Captain Reichart speak to August M. Ledesma, Jr. and on two occasions that evening tell August M. Ledesma, Jr. to remove the magazines which had been left in Ledesma's store from the store without delay. Affiant does not recall the exact words used except that Ledesma was told to "get rid of" the magazines and "make sure" the magazines were "not there" at some later date. There was no doubt from the statements made by Captain Reichart that, if Ledesma did not remove the magazines immediately Ledesma would be prosecuted, the magazines would be seized, or other action would be taken by Captain Reichart against Ledesma. The words of Captain Reichart were clearly a threat to Ledesma that action would be taken if the magazines were not removed.

JACK PEEBLES

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 21ST DAY
OF APRIL, 1969.

/s/ JOHN E. JACKSON, JR.
Notary Public

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: August M. Ledesma, Jr., who, upon being duly sworn, according to law, did depose and say:

That he is one of the petitioners in CA No. 69-322 in the United States District Court for the Eastern District of Louisiana;

That on the evening of January 27, 1969, immediately after the seizure of magazines and arrest of affiant as alleged in his Complaint, Captain Reichart, defendant in the above numbered action, called affiant's attention to the boxes of magazines which had been left by the police officers but which were made up principally of nudist magazines similar to the ones which were taken by the officers, and at that time Captain Reichart said:

"If I were you I would get these out of here as soon as you get back from the courthouse. You probably can send them back to the people you got them from and get your money back."

As affiant was leaving the store, while under arrest, he (affiant) spoke to an attendant at the store and told him not to sell any nudist magazines which the police officers had left. At that time Captain Reichart said to affiant: "You'd better be sure not to forget to get those out of here tonight."

That same evening, after arriving at the St. Bernard Courthouse, and in the presence of affiant's attorney, Jack Peebles, Captain Reichart again instructed affiant to be sure to take the nudist magazines out of the store as soon as affiant got back to the store. After an interval of at least fifteen minutes, and shortly before affiant was released, Captain Reichart repeated his statement to affiant to "take the magazines out of the store" as soon as affiant returned to the store.

That at the time of affiant's arrest and since that time it has been affiant's policy and the policy to the management of the Board Bruxelles Seafood and News Center to (a) refuse to sell or display to juveniles any nudist or girlie magazines of the type seized by the police officers on January 27, 1969, (b) display the said magazines only in a restricted area removed from the sight of the general public, and (c) refuse any lurid advertising of the said magazines. In furtherance of this policy signs restricting the display area of these magazines were kept in the store at all times and

minors were forbidden to go into the area prohibited by the signs. The attached photographs numbered "Ledesma 1" and Ledesma 2" are photographs taken two days after the aforementioned raid and arrest, and the photographs accurately represent the display of magazines in the aforementioned store at the time of affiant's arrest and since that time. Photograph "Ledesma 1" represents a view of the inside of the store to a customer as the customer enters from the front entrance to the store, and shows that no girlie or nudist magazines of the aforementioned type can be seen by the general public trading in the said store. Photograph "Ledesma 2" shows the entrance to the area restricted to persons over the age of eighteen years. The magazines and publications seized by the police on January 27, 1969 were displayed in the restricted area on the rack appearing in the right foreground of "Ledesma 2", so that no general customer could view the said publications without going into the restricted area.

(Signed) AUGUST M. LEDESMA, JR.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 21ST DAY
OF APRIL, 1969.

/s/ JOHN E. JACKSON, JR.
Notary Public

STIPULATION

It is agreed and stipulated among the parties that there were two photographs attached to the original affidavits duly entered in evidence in this matter, which photographs depict the views described in the attached affidavit. These photographs are now missing and cannot be duplicated. Diligent efforts to locate the photographs have been unsuccessful.

New Orleans, Louisiana, this 6th day of November, 1969.

(Signed) JACK PEEBLES
JACK PEEBLES,
Attorney for Plaintiffs

(Signed) CHARLES LIVAUDAIS
CHARLES LIVAUDAIS,
Attorney for Defendants

ANSWER ON BEHALF OF LEANDER H. PEREZ, JR.

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 21, 1969

Now into Court comes Leander H. Perez, Jr., made defendant herein, and for answer to the complaint of the petitioners avers that:

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief can be granted.

SECOND DEFENSE

The Court lacks jurisdiction in that the amount of the civil matter does not exceed the Statutory requirements.

THIRD DEFENSE

Defendant answers the complaint as follows:

1.

Defendant admits that plaintiffs are the owners of

a newsstand in the Parish of St. Bernard, State of Louisiana, named the Broad-Bruxelles Seafood and News Center No. 3, but otherwise denies all allegations of Paragraph 1 of the Petition for want of sufficient information to justify a belief.

2.

Defendant admits the names and status as outlined in Paragraph 2 of the Petition.

3.

Paragraph 3 of the complaint is denied.

4.

Paragraph 4 of the complaint is denied.

5.

Paragraph 5 of the complaint is denied.

6.

Defendant denies Paragraph 6 of the complaint except to admit the defendants were acting under a valid Statute of the State of Louisiana and the Parish of S. Bernard in the regular performance of their duty.

7.

Defendant admits that plaintiff, August M. Ledesma,

Jr. was arrested in violation of the State Statutes as enumerated, and admits that certain items were taken as evidence from the establishment incidental to the arrest, but otherwise denies all other allegations of Paragraph 7 of the complaint.

8.

Defendant admits that plaintiffs Ledesma is being prosecuted for the above-mentioned violations of the law, but denies all other allegations of Article 8 of the complaint.

9.

Defendants admits that certain publications were taken as evidence incidental to the arrest, and deny the remainder of Paragraph 9.

10.

Paragraph 10 of the complaint, is denied, defendant further stating that search warrant was not required under these circumstances.

11.

Paragraph 11 of the complaint is denied.

12.

Paragraph 12 of the complaint is denied.

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13.

Paragraph 13 of the complaint is denied.

14.

Paragraph 14 of the complaint is denied.

15.

Paragraph 15 of the complaint is denied for want of sufficient information to justify a belief.

16.

Paragraph 16 of the complaint is denied.

17.

Paragraph 17 of the complaint is denied.

18.

Paragraph 18 of the complaint is denied.

19.

Defendant admits that the actions were in good faith under valid State Statutes, and deny remainder of Paragraph 19 of the complaint.

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20.

Paragraph 20 of the complaint is denied.

21.

Paragraph 21 of the complaint is a legal conclusion and requires no answer.

22.

Paragraph 22 of the complaint is denied.

23.

Paragraph 23 of the complaint is denied.

24.

Paragraph 24 of the complaint is denied.

25.

Paragraph 25 requests admissions of public records and said public records are the best evidence of themselves.

26.

Paragraph 26 of the complaint is denied.

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27.

Paragraph 27 of the complaint is denied.

28.

Paragraph 28 of the complaint is denied.

FOURTH DEFENSE

Defendant avers that all actions by defendants have been performed in good faith under valid state law, which is constitutional.

WHEREFORE, defendant demands judgment in his favor and in favor of all defendants, and against plaintiffs, rejecting plaintiff's claims, with costs.

Respectfully submitted,

LEANDER H. PEREZ, JR.
DISTRICT ATTORNEY

CHARLES H. LIVAUDAIS
ASSISTANT DISTRICT
ATTORNEY

/s/ CHARLES H. LIVAUDAIS

(Certificate of Service omitted)

EXHIBITS

(Title omitted in printing)

Date	Id. No.	Description
1969	P-1	Peebles affidavit
4-21	P-2	Ledesma affidavit
	P-3	St. Bernard Ordinance 21-69
	P-4	Bill of Info. 17-086
	P-5	Bill of Info. 17-085
	P-6	Bill of Info. 17-087
	P-7	Bill of Info. 17-088
	P-8	3 unreported opinions 6051 E. District of Va 67-C-450 Dist. S. Indiana 68-1392 S. Florida

The following exhibit offered by Jefferson Parish identified as 9.

Bills of Information
 Jefferson Parish (note attachment in Brown manila envelope
 Nos. 113050
 113051
 113052
 113053
 113054

	P-9	Transcript of hearing Motion to Suppress Jefferson Parish Nos. 113050 113051 113052 113053 113054
Ledesma v.		
Perez	D-1	Affidavit Reichart
	D-2	Affidavit Bethea
	D-3	Affidavit Wendling
	D-4	Affidavit Darsam
	D-5	Affidavit Manuel
	D-6	Affidavit Rowley
	D-7	Box of Magazine and Playing Cards
Stipulation		
Of Facts	69-322	
ditto	68-1927	

OPINION

Filed: July 14, 1969

United States District Court
Eastern District of Louisiana
New Orleans Division

Delta Book Distributors, Inc., et al

versus NO. 68-1927
CIVIL ACTION
SECTION D

Alwynn J. Convich, Etc., Et Al

August M. Ledesma, Jr., Et Al

versus NO. 69-322
CIVIL ACTION
SECTION D

Leander H. Perez, Jr., Et Al

Jack Peebles, Esq.
Attorney for Plaintiffs

A. W. Wambsgans, Esq.
James F. Quaid, Esq.
Charles H. Livaudais, Esq.
Attorneys for Defendants

Before WISDOM, Circuit Judge, and BOYLE and
RUBIN, District Judges.

BOYLE, District Judge:

These actions arise from the arrest by the defendant law enforcement officers in Jefferson¹ and St. Bernard² Parishes, Louisiana, of the individual plaintiffs and the incidental seizures of quantities of publications claimed to be obscene.

Those plaintiffs, residents of the Parishes of Orleans and Jefferson, are the owners and operators of newsstands in both Parishes. The corporate plaintiff, Delta Book Distributors, Inc., is a New York corporation engaged in the business of distributing books and magazines to newsstands, including those of the individual plaintiffs.

Jurisdiction is asserted and exists under 28 U.S.C. 1331, 1343, 2201 and 2281 and 42 U.S.C. 1983.

The facts in both cases are substantially parallel. In both, the arrests and seizures were made without warrants and without prior adversary judicial hearing on or determination of the claimed obscene character of the seized materials. In both, publications similar to those seized were purchased by the enforcement officers³ prior to the arrests.

¹In Delta Book, the defendant Cronvich is Sheriff of Jefferson Parish, the defendants Lightell, Lemoine and Frisch are his deputies and the defendant Letini is Marshal of the Town of Kenner, Jefferson Parish.

²In Ledesma, the defendant Perez is District Attorney and the defendants Rechart, Wendling and Bethea are Deputy Sheriffs of the Parish of St. Bernard.

³Three by the Jefferson Parish officers and four by their St. Bernard Parish counterparts.

Following their arrests two-count bills of information were filed against the individual plaintiffs in the Delta Book case⁴ and against only one of the plaintiffs in the Ledesma case, namely, August M. Ledesma, Jr.,⁵ charging violations of the Louisiana obscenity statute. Additionally, Ledesma was charged in two bills⁶ with violations of the St. Bernard Parish obscenity ordinance,⁷ which, prior to the hearing herein, had been nolle prosequied.

The charges⁸ filed against Ledesma in St. Bernard Parish were laid under Louisiana Revised Statutes,

⁴The prosecutions instituted in the 24th Judicial District Court for the Parish of Jefferson are styled and numbered as follows: State of Louisiana v. Fernin J. Farrell, No. 113-050; Ronald J. Walker, No. 113-051; Ronald J. Walker and Charles Rhody, No. 113-052; Lawrence P. Pittman, Jr., Harold J. Spiess, Jr. and August M. Ledesma, Jr., No. 113-053; Lawrence P. Pittman, Jr., No. 113-054.

⁵State of Louisiana v. August M. Ledesma, Jr., Nos. 17-085 and 17-086 of the docket of the 25th Judicial District Court for the Parish of St. Bernard.

⁶State of Louisiana v. August M. Ledesma, Jr., Nos. 17-087 and 17-088, 25th Judicial District Court for the Parish of St. Bernard.

⁷No. 21-60.

⁸In case No. 17-085, it is charged that Ledesma, on January 27, 1969, "did produce, sell, exhibit, give or advertise with the intent to primarily appeal to the prurient interest of the average person, lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture drawing, motion film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character * * *" in violation of R.S. 14:106(2).

In case No. 17-086, it is charged that Ledesma "did possess" rather than "did produce" the objects described [in the information in No. 17-085] in violation of R.S. 14:106(3).

Title 14, Section 106 A(2) and A(3).⁹ Those¹⁰ against the Delta Book plaintiffs in Jefferson Parish are brought under the same subsections of the Louisiana statute in addition to subsection A(7).¹¹

Unlike the St. Bernard Parish officers, who seized forty-five publications and a deck of playing cards, while leaving more than three hundred similar publications, the Jefferson Parish officers seized all copies of the alleged offending publications, including multiple copies of some, which could be found on the premises.¹²

In both cases, the Federal constitutional issues raised herein were presented to the respective State Trial Courts in Motions to Quash the bills of information and to Suppress the seized evidence and were decided adversely to the plaintiffs herein.

⁹See Footnote 23.

¹⁰The bills of information are identical as to all plaintiffs (see Footnote 4) except as to the dates on which and places at which the offenses are alleged to have occurred, and in substance charge that the respective plaintiffs did " * * * wilfully and intentionally exhibit and possess with intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines * * * " (Count 1) and did " * * * wilfully and intentionally exhibit and possess with the intent to display, advertise and/or sell lewd, lascivious and/or sexually indecent magazines and/or books * * * to the general public and/or particularly in the presence of unmarried persons under the age of 17 years * * * " (Count 2) in violation of Sections 2, 3 & 7, R.S. 14:106.

¹¹See Footnote 23.

¹²From the Expressway News Center, 56 magazines were seized on August 23, 1968; from the Veterans Newstand, 200 and 296 books and magazines were seized on September 6 and October 18, 1968, respectively; and from the Broad Bruxelles Seafood & News Center, 138 and 62 books and magazines were seized on October 3 and 18, 1968, respectively.

In view of the result we reach, it is unnecessary in either case to consider whether the seized publications are in fact obscene.¹³

The principal relief prayed for in each case is identical,¹⁴ viz, a declaratory judgment decreeing the Louisiana statute unconstitutional (a) on its face and (b) as applied to the plaintiffs; preliminary and permanent injunctions enjoining the defendants¹⁵ (a) from prosecuting the plaintiffs under the pending charges, (b) from prosecuting them for violation of the statute in the future and (c) from seizing materials in the future (1) without a prior adversary judicial proceeding and (2) without a warrant; the return of the seized materials and damages.

We have for decision all issues, except the issue of damages which was severed and reserved for the single Judge Court.

¹³In the Delta Book case, the parties stipulated, though subject to the plaintiffs' objection of irrelevancy, that if called as witnesses "men and women from different income levels and various ages, law enforcement personnel, professors, school teachers, ministers, priests and rabbis would testify that in their opinion all of the aforementioned books and magazines are: (a) obscene, in the case of witnesses called by the defendants, and (b) not obscene, in the case of said witnesses called by the plaintiffs."

Also in the Delta Book case, "samples" of the seized publications were received in evidence subject to plaintiffs' objection of irrelevancy.

In the Ledesma case, all of the seized materials were received in evidence subject also to the plaintiffs' objection of irrelevancy.

¹⁴In the Ledesma case, the plaintiffs also seek to have the St. Bernard Parish obscenity ordinance declared unconstitutional.

¹⁵In Delta Book, the District Attorney for the Parish of Jefferson is not a party defendant. In Ledesma, the District Attorney for the Parish of St. Bernard is a defendant.

The guarantee of freedom of speech embodied in the First Amendment to the United States Constitution does not extend to obscenity. *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). Consequently, obscene utterances and materials, properly defined, may be the subject of Federal and State regulation or suppression. However, since "constitutionally protected expression ... is often separated from obscenity only by a dim and uncertain line,"¹⁶ any attempt, be it Federal or State, to regulate or suppress allegedly obscene material must be closely scrutinized to the end that protected expression is not abridged in the process. Accordingly, "the Constitution requires a procedure 'designed to focus searchingly on the question of obscenity' before speech can be regulated or suppressed. *Marcus v. Search Warrants*, 367 U.S. 717, 732, 81 S. Ct. 1708, 1716, 6 L. Ed. 2d 1127," and "[t]he dissemination of a particular work, which is alleged to be obscene, should be completely undisturbed until an independent determination of obscenity has been made by a judicial officer, including an adversary hearing. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 211, 84 S. Ct. 1723, 12 L. Ed. 2d 809; *Metzger v. Percy*, 7 Cir., 393 F. 2d 202, 204; *United States v. Brown*, S.D. N.Y., 274 F. Supp. 561; *Cambist Films, Inc. v. Illinois*, N.D. Ill., Eastern Div., 292 F. Supp. 185, decided October 21, 1968."¹⁷

Since prior restraint upon the exercise of First

¹⁶*Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).

¹⁷*Cambist Films, Inc. v. Tribell*, 293 F. Supp. 407 (E.D. Ky. 1968).

Amendment rights can be exerted through seizure¹⁸ (with or without a warrant) of the allegedly offensive materials, arrest (with or without a warrant) of the alleged offender or through the threat of either or both seizures and arrest, the conclusion is irresistible in logic and in law that none of these may be constitutionally undertaken prior to an adversary judicial determination of obscenity.¹⁹

We are mindful of the fact that even attempts to regulate obscenity incorporating procedures for affording the required adversary hearing would themselves constitute prior restraints.²⁰ For example, it might be argued that the expense of legal representation at such hearings, the apprehension as to whether or not the allegedly obscene materials should continue to be sold pending the outcome of the hearing and so forth would serve to "chill"²¹ First Amendment rights. We can readily conceive, therefore, that much litigation would be spawned by the adoption of adversary hearing procedures. Nonetheless, it is apparent that there must be some permissible prior restraint, be it however subtle, if obscenity is not protected by the First A-

¹⁸As *Cambist Films, Inc. v. Tribell*, footnote 3, *supra*, makes clear, the principles announced in such cases as *A Quantity of Books*, *supra*, with respect to searches and seizures in civil forfeiture cases apply with equal, if not greater, force in cases involving searches and seizures incident to criminal prosecutions.

¹⁹*Poulos v. Rucker*, 288 F. Supp. 305 (M.D. Ala. 1968).

²⁰"Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene..." *Smith v. People*, 361 U.S. 147, 154-155, 80 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1960).

²¹*Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965).

ment and State attempts to regulate it are to be enforceable. It is left to those states seeking to regulate obscenity to devise constitutionally acceptable procedures for the enforcement of any such regulations. However, these procedures, among others, may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity.

Applying these principles to the cases before us, the arrests, as well as the seizures claimed to be incident thereto, are clearly invalid for lack of a prior adversary determination of the obscenity of the materials upon which the arrests and seizures were based. The fact that in each case some materials were purchased rather than seized is of no moment in view of the requirement of an adversary determination of obscenity prior to arrest or threat of arrest.²²

We turn now to the specific relief prayed for in each of the suits.

Initially, we are asked to declare the Louisiana Obscenity Statute²³ unconstitutional on its face and as applied. This same relief is sought with respect to the St. Bernard Parish Obscenity Ordinance.²⁴ Since the Louisiana statute is composed of three lettered para-

²²Of course, the defendant cannot be ordered to return the purchased materials, as in the instance of those seized, since title thereto has passed.

²³La. R.S. 14:106. See Appendix A.

²⁴Ordinance #21-60 of the Parish of St. Bernard. See Appendix B.

graphs, with Paragraph "A", defining obscenity, being further subdivided into seven subparts each of which delineates a separate offense, we address ourselves solely to those subsections under which any plaintiff was charged in either of the cases.²⁵ The subsections of Paragraph "A" with which we are concerned are "(2)", "(3)" and "(7)".

The plaintiffs contend that the statute is unconstitutional on its face because it defines obscenity too broadly, affords no ascertainable standard of guilt, and lacks the required element of scienter.

We are aware of the United States Supreme Court's per curiam reversal in *Henry v. Louisiana*, 392 U.S. 655, 88 S. Ct. 2274, 20 L. Ed. 2d 1343 (1967), citing only *Redrup v. New York*, 386 U.S. 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967), also a per curiam opinion. In view of the fact that the decision of the Louisiana Supreme Court in *Henry* (reported at 198 So. 2d 889) not only

²⁵This Court declines to render a declaratory judgment concerning the constitutionality vel non of the entire statute in view of the fact that as to those sections or subsections under which plaintiffs have not been charged there is no "actual controversy" as required by 28 U.S.C. §2201. Although "a request for a declaratory judgment that a state statute is overbroad on its face must be considered independently of any request for injunctive relief" *Zwickler v. Koota*, 389 U.S. 241, 88 S. Ct. 391, 19 L. Ed. 2d 444 (1967) and abstention has been disapproved in cases involving First Amendment rights, nonetheless, the Supreme Court in *Zwickler* in footnotes 3 and 15 recognized that before declaratory relief is proper the usual prerequisites therefor must be established. Accordingly, as to those sections under which plaintiffs have not been charged, the prayer for declaratory relief comes prematurely in that there is neither "substantial controversy" nor "sufficient immediacy." See *Machesky v. Bizzell*, 5 Cir., 1969, ____ F. 2d ____ [No. 26832, May 5, 1969].

upheld the constitutionality of La. R.S. 14:106 §A(2) and (3) as not being violative of freedom of speech or vague, but, in addition, erroneously²⁶ construed the term "contemporary community standards" to embody a purely local, rather than national, norm, we cannot conclude from the per curiam opinion that the Supreme Court of the United States passed upon the constitutionality of La. R.S. 14:106.

A study of subsections "(2)" and "(3)" convinces us that neither subsection is unconstitutional on its face. Subsection "(3)" incorporates the standards of obscenity contained in subsection "(2)". We find that these subsections define obscenity in terms substantially similar to those approved in *Roth v. United States*, supra, in that expression regulated by the statute is that intended "to primarily appeal to the prurient interest of the average person." As was the court in *Cambist Films, Inc. v. Tribell*, supra, we are aware of the language of Mr. Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966) to the effect that material may not be legally adjudged obscene unless it meets each of the following three tests: "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." And, we con-

²⁶*Jacobellis v. Ohio*, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964).

cur in the statement of the Court in *Tribell*, supra, that "[i]n listing these three elements, Mr. Justice Brennan was not making *additional* requirements, but was merely explaining the *Roth* test." Therefore, we find that subsections (2) and (3) of Paragraph A of La. R.S. 106, while not explicitly inclusive of the tripartite test enunciated by Mr. Justice Brennan, do, if judicially interpreted and applied in light thereof, satisfy constitutional requirements.

Plaintiffs' charge that the statute is vague is without merit in so far as subsections (2) and (3) are concerned. The definition of obscenity through the aid of adjectives such as "lewd," "lascivious" and "filthy" and the adjectival phrase "sexually indecent" embodies an ascertainable standard of guilt when these terms are taken to have their commonly accepted meanings. Furthermore, if the term "obscene" is itself not unconstitutionally vague,²⁷ a fortiori, the term "obscenity" explained by the adjectives used in these subsections is not vague.

Finally, plaintiffs' attack upon the statute for lack of the required element of "scienter" is without merit. The use of the word "intentional" and the phrase "with the intent" in the statute satisfy the requirements for "scienter" set forth in *Smith v. People*, supra. Indeed, we concur in the following statement of the Supreme Court of Louisiana in *State v. Roufa*, 241 La. 474, 129 So. 2d 743 (1961): "We conclude that the word 'Intentional' and the phrase 'With Intention' (sic) in the

²⁷*Mishkin v. State of New York*, 383 U.S. 502, 86 S. Ct. 958, 16 L. Ed. 2d 56 (1966).

Louisiana Obscenity Statute mean that knowledge is implied where one has criminal intent. It leaps to the mind that knowledge is necessary to intention and that one cannot have intention without knowledge. We find that Paragraph Two of LSA-R.S. 14:106 meets the requirements laid down in the Smith case" (Citations and footnote reference omitted.)

Subsection "(7)" of Paragraph A is unconstitutional on its face as plaintiffs contend. A simple reading of this subsection reveals that by its terms it is overbroad.²⁸ A literal application thereof would, for example, make it a criminal offense to display, for any purposes, universally accepted anatomical works or recognized works of art or the like anywhere but "in art galleries." Such a limitation is patently unconstitutional.

We, here, note that the fact that subsection "(7)" of Paragraph A of the statute is unconstitutional, is not fatal to the entire statute in light of the severability clause found in Section 2 of Act 647 of 1968.²⁹

We find a total lack of evidence to support the conten-

²⁸"The portrayal of sex, e.g. in art, literature and scientific works, is not itself sufficient reason to deny the material the constitutional protection of freedom of speech and press." *Roth v. United States*, supra.

²⁹La. R.S. 14:106 would appear to be severable even in the absence of a severability clause in view of the fact that each subpart of Paragraph A delineates a separate and independent offense. The act would, with clarity, state an offense notwithstanding total deletion of subpart "(7)" of Paragraph A. For a comprehensive discussion of the factors to be considered in determining severability see *Statutes and Statutory Construction*, Sutherland, Vol. 2, Sections 2401 et seq.

tion that La. R.S. 14:106 is unconstitutional as applied to the plaintiffs.³⁰ To the extent that this contention is based upon the lack of the required procedural safeguards prior to seizure or arrest, it has been disposed of by what we have hereinabove held with respect to the necessity of an adversary judicial determination of obscenity.

The plaintiffs in the case arising from St. Bernard Parish were charged under the St. Bernard Obscenity Ordinance as well as under the State statute. Subsequently, but prior to the hearing in this court, the charges under the ordinance were nolle prosequied. However, we are asked to pass on the constitutionality of this ordinance for the reason that plaintiffs fear prosecution thereunder at some future date.³¹ Accordingly, in order to grant complete relief, we have examined the ordinance and find it to be unconstitutional

³⁰We make no finding, however, as to whether the allegedly obscene materials here are protected by the First Amendment, and whether, therefore, the statute would be unconstitutional as applied to them. That question requires the application of the constitutional standard of obscenity to the seized printed matter. We leave the determination to be made in the first instance by the state court after the adversary hearing which we today hold necessary.

³¹Although it is not the function of a three-judge federal district court to determine the constitutionality or enjoin the enforcement of a local ordinance, as distinguished from statutes of state-wide application, *Moody v. Flowers*, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967), the court takes this opportunity to express its views on the constitutionality of the ordinance in the interest of judicial economy. The view expressed by this court concerning the constitutionality of the ordinance is shared by the initiating federal district judge and is adopted by reference in his opinion issued contemporaneously herewith.

and unenforceable. The ordinance is poorly drafted and in some respects may be unintelligible and, therefore, is mortally infected with the vice of vagueness. Additionally, the ordinance is too broad, in that it seeks to regulate material protected by the First Amendment as interpreted by recent judicial decisions.

Assuming that this ordinance was constitutional or that a constitutional replacement therefor was enacted, local authorities in the enforcement thereof would be bound by the same requirement of an adversary hearing as State authorities are with respect to the enforcement of State statutes.

Plaintiffs seek to enjoin the defendants from proceeding with the prosecutions pending against them, as well as from instituting any new prosecutions and undertaking any further seizures or arrests. We decline to grant any injunctive relief in either of the cases before us.

In view of our holding that the arrests and seizures in these cases are invalid for want of a prior adversary judicial determination of obscenity, which holding requires suppression and return of the seized materials,³²

³²*Chimel v. State of California*, decided by the Supreme Court of the United States on June 23, 1969, 37 L.W. 4613, limits the area in which a search may be made incidental to a lawful arrest. We need not be concerned with whether *Chimel* applies to searches and seizures occurring before June 23, 1969. In the light of the absence of any direct controlling expression in *Chimel* and *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L. Ed. 2d 1199 (1967); *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 (1965); *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 61, 21 L. Ed. 2d 212 (1968), and *Desist v.*

the prosecutions should be effectively terminated. We have no reason to question that the defendant law officers and prosecuting attorneys of both Parishes will, in good faith, abide by our rulings herein as to pending or future prosecutions or future arrests and seizures. Doing so will make it unnecessary to issue any injunctions with respect to either, whether under the State statute or the St. Bernard Parish ordinance.³³ However, we retain jurisdiction for the purposes of hereafter entering any orders necessary to enforce the views expressed herein.

Accordingly, for the reasons assigned, IT IS ORDERED that judgment in both cases be entered decreeing:

1. That all seized materials be returned, instanter, to those from whom they were seized,
2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,
3. That the preliminary and permanent injunctions prayed for be denied, and
4. That jurisdiction be retained herein for the is-

U.S., 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969), it would appear that the limiting effect of *Chimel* would not be held retrospectively applicable. However, even assuming the contrary, in view of our holding that the lack of a prior adversary hearing taints the warrantless arrests involved here, the searches, whether confined to the limits set by *Chimel* or not, and the resultant seizures would fall by reason of the unlawful arrests incidental to which the defendants urge they acted in seizing the materials.

³³See Footnote 29, *supra*.

suance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.

/s/ JOHN MINOR WISDOM
UNITED STATES
CIRCUIT JUDGE

/s/ EDW. J. BOYLE, SR.
UNITED STATES
DISTRICT JUDGE

RUBIN, J., dissents in part and will file written reasons.

For the reasons assigned in the foregoing 3-Judge Court opinion, IT IS ORDERED that judgment be entered herein decreeing:

1. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional.

2. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, July 14th, 1969.

/s/ Edw. J. Boyle, Sr.
UNITED STATES
DISTRICT JUDGE

APPENDIX "A"

§ 106. Obscenity

A. Obscenity is the intentional:

(1) Exposure of one's person in a public place in such manner that any part of a sex organ may be seen by another person, with the intent of arousing sexual desire.

(2) Production, sale, exhibition, gift, or advertisement with the intent to primarily appeal to the prurient interest of the average person, of any lewd, lascivious, filthy or sexually indecent written composition, printed composition, book, magazine, pamphlet, newspaper, story paper, writing, phonograph record, picture, drawing, motion picture film, figure, image, wire or tape recording or any written, printed or recorded matter of sexually indecent character which may or may not require mechanical or other means to be transmitted into auditory, visual or sensory representations of such sexually indecent character.

(3) Possession with the intent to sell, exhibit, give or advertise any of the pornographic material of the character as described in Paragraph (2) above, with the intent to primarily appeal to the prurient interest of the average person.

(4) Performance by any person or persons in the presence of another person or persons with the intent of arousing sexual desire, of any lewd, lascivious, sexually indecent dancing, lewd, lascivious or sexually indecent posing, lewd, lascivious or sexually indecent body movement.

(5) Solicitation or attempt to entice any unmarried person under the age of seventeen years to commit any act prohibited by this section.

(6) Requirement by a person, as a condition to a sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication to a purchaser or consignee, that such purchaser or consignee receive for resale any other article, book or publication reasonably believed by such purchaser or consignee to contain articles or material of any kind or description which are designed, intended or reasonably calculated to or which do in fact appeal to the prurient interests of the average person in the community, as judged by contemporary community standards, or the denying or threatening to deny any franchise or to impose any penalty, financial or otherwise, by reason of the failure of any person to accept such articles or things or by reason of the return thereof.

(7) Display of nude pictures of a man, woman, boy or girl in any public place, except as works of art exhibited in art galleries.

B. In prosecutions for obscenity, lack of knowledge of age or marital status shall not constitute a defense.

C. Whoever commits the crime of obscenity shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both.

When a violation of Paragraphs (1), (2), (3), and (4) of Subsection (A) of this Section is with or in the presence of an unmarried person under the age of seventeen years, the offender shall be fined not more than one thousand dollars, or imprisoned for not more than five years with or without hard labor, or both.

Amended by Acts 1958, No. 388, § 1; Acts 1960, No. 199, § 1; Acts 1962, No. 87, § 1; Acts 1968, No. 647, § 1, emerg. eff. July 20, 1968, at 1:30 P.M.

APPENDIX "B"

Police Jury
ST. BERNARD PARISH
St. Bernard Courthouse Annex
Chalmette, Louisiana

EXTRACT OF THE OFFICIAL PROCEEDINGS OF THE POLICE JURY OF THE PARISH OF ST. BERNARD, STATE OF LOUISIANA, TAKEN AT THE REGULAR MEETING HELD IN THE POLICE JURY ROOM OF THE COURTHOUSE ANNEX, AT CHALMETTE, LOUISIANA, ON NOVEMBER 2, 1960, AT ELEVEN O'CLOCK (11:00) A. M.

On motion of Celestine Melerine, seconded by Joseph V. Papania and upon recommendation of the District Attorney of the Parish of St. Bernard, the following Ordinance was adopted:

ORDINANCE #21-60

An Ordinance known as the Ordinance of St. Bernard Parish, relative to prohibiting and defining the offense of obscenity and indecent literature, adding thereto the offense of "at-tempt", and prescribing penalties for the violation thereof.

SECTION 1.

Offense of obscenity defined and prohibited.

SECTION 2.

BE IT ORDAINED, by the Police Jury of the Parish

of St. Bernard that obscenity is prohibited and is hereby defined as the intentional.

SECTION 3.

BE IT FURTHER ORDAINED, that public personal exposure of the female breast or the sexual organs or fundament of any person of either sex.

SECTION 4.

BE IT FURTHER ORDAINED, that production, sale, exhibition, possession with intent to display, or distribution of any obscene, lewd, lascivious, prurient or sexually indecent print, advertisement, picture, photograph, written or printed composition, model, statue, instrument, motion picture, drawing, phonograph recording, tape or wire recording, or device or material of any kind.

SECTION 5 (a)

BE IT FURTHER ORDAINED that the performance of any dance, song, or act in any public place, or in any public manner representing or portraying or reasonable calculated to represent or portray any act of sexual intercourse between male and female persons, or any act of perverse sexual intercourse or contact, or unnatural carnal copulation, between persons of any sex, or between persons and animals.

SECTION 5 (b)

OR FURTHER, the performance in any public place, or any public manner of any obscene, lewd, lustful, lascivious, prurient or sexually indecent dance, or the rendition of any obscene, lewd, lustful, lascivious, prurient or sexually indecent song or recitation.

SECTION 6.

BE IT FURTHER ORDAINED, PRODUCTION, POSSESSION WITH INTENT to display, exhibition, distribution, or sale of any literature as defined herein containing one or more pictures of nude or semi-nude female persons, wherein the female breast or any sexual organ is shown or exhibited, and where, because of the number or manner of portrayal in which such pictures are displayed in such literature, they are designed to appeal predominantly to the prurient interest.

SECTION 7. BE IT FURTHER ORDAINED, that it shall also be unlawful for any person to attempt to commit any of the violations set forth in this section.

SECTION 8. BE IT FURTHER ORDAINED, that any person upon conviction of a violation of this section shall be sentenced to serve not more than ninety (90) days, or pay a fine of not more than one hundred dollars (\$100.00) or both, in the discretion of the Court.

BE IT FURTHER ORDAINED, that persons convicted of an attempt to violate this section shall be sentenced to not more than one-half of the maximum penalty prescribed, or pay not more than half of the maximum fine or both, as set forth above.

SECTION 9. BE IT FURTHER ORDAINED, that the word literature as used herein means and includes a book, booklet, pamphlet, leaflet, brochure, circular, folder, handbill or magazine. The word picture as used herein means and includes any photograph, lithograph,

drawing, sketch, abstract, poster, painting, figure, image, silhouette, representation or facsimile.

SECTION 10. BE IT FURTHER ORDAINED, that this Ordinance shall be published in the Official Journal of the Parish, the St. Bernard Voice.

This Ordinance having been submitted to a vote, the vote thereon was as follows:

YEAS: Henry C. Schindler, Jr., Joseph V. Papania, Peter N. Huff, Peter Perniciaro, Louis P. Munster, John W. Booth, Sr., Claude S. Mumphrey, Celestine Melrine, Edward L. Jeanfreau, and Mrs. Blanche Molero.

NAYS: None

ABSENT: None

And the Ordinance was declared adopted on this, the 2nd day of November, 1960.

/s/ Joseph E. Sorci
JOSEPH E. SORCI
SECRETARY

/s/ Valentine Riess
VALENTINE RIESS
PRESIDENT

CERTIFICATE

I CERTIFY THAT the above and foregoing is a true and correct copy of an ordinance adopted by the St. Bernard Parish Policy Jury at a Regular meeting held at Chalmette, Louisiana, in the Police Jury Room at the Courthouse Annex on the 2nd day of November, 1960.

Witness my hand and the Seal of the St. Bernard
Parish Police Jury this 11th day of February, 1969.

/s/ R. M. McDOUGALL
R. M. McDOUGALL
SECRETARY

JUDGMENT

Filed: Aug. 13, 1969

United States District Court
Eastern District of Louisiana
New Orleans Division

August M. Ledesma, Jr. Harold J. Speiss, and Law-
rence P. Pittman

versus

NO. 69-322
CIVIL ACTION
SECTION D

Leander H. Perez, Jr., Individually and as District
Attorney For the Twenty-Fifth Judicial District, State of
Louisiana;

Louis Reichart, Individually and as Captain in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana;

George Bethea, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana; and

Earl Wendling, Individually and as a Deputy in the
Sheriff's Office in the Parish of St. Bernard, State of
Louisiana

For the written reasons of the Court on file herein, and considering the direction of the Court as to the entry of judgment;

IT IS ORDERED AND ADJUDGED that there be judgment decreeing:

1. That all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized,

2. That said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs,

3. That the preliminary and permanent injunctions prayed for be denied,

4. That St. Bernard Parish Ordinance No. 21-60 is unconstitutional, and

5. That jurisdiction be retained herein for the issuance of such further orders as may be necessary and proper.

New Orleans, Louisiana, this 13th day of August 1969.

(Signed) A. DALLAM O'BRIEN, JR.
A. DALLAM O'BRIEN, JR.,
CLERK

APPROVED AS TO FORM:

/s/ EDW. J. BOYLE, SR.

UNITED STATES DISTRICT JUDGE

Jack Peebles, Esq.
A. W. Wambsgans, Esq.
Robert I. Broussard, Esq.
Charles Livaudais, Esq.
Leander Perez, Jr., Esq.

OPINION

Filed: Sep. 3, 1969

United States District Court
Eastern District of Louisiana
New Orleans Division

Delta Book Distributors, Inc., et al,
Plaintiffs,

versus

CIVIL ACTION
NO. 68-1927
SECTION "D"

Alwynn J. Cronvich, Etc., et al,
Defendants,
August M. Ledesma, Jr., et al,
Plaintiffs,

versus

CIVIL ACTION
NO. 69-322
SECTION "D"

Leander H. Perez, Jr., Etc., et al,
Defendants.

Jack Peebles, Esq.

Attorney for Plaintiffs

A. W. Wambsgans, Esq.

Attorney for Defendants

James F. Quaid, Esq.

Attorney for Defendants

Charles H. Livaudais, Esq.

Attorney for Defendants

RUBIN, District Judge, dissenting:

I respectfully dissent from that portion of the decision that holds it unconstitutional for the state to arrest a defendant on a charge of violating a valid statute punishing the crime of selling pornographic literature, and from the suggestion that, to be constitutional, a state statute "may have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity."

My brothers and I agree that we are bound by the principal "that obscenity is not withing the area of constitutionally protected speech or press." *Roth v. United States*, 1957, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309. Adhering, as we must, to the repeated decisions of a majority of the Supreme Court, we unanimously reject the dissenting view of Justices Black and Douglas that both federal and state governments are "without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind" *Ginzburg v. United States*, 1966, 383 U.S. 463, 475, 86 S.Ct. 942, 950.

But the majority of this court suggests that, in order to exercise its constitutional power, the state must adopt a procedure unprecedented in criminal law and incapable of effective enforcement. For, if their view is correct, no prosecution could be commenced under this statute that we all agree is constitutional unless the state first holds a separate adversary proceeding against every single news dealer for each item of pornography that he might choose to see at any time. Even though a court might have decided that a dealer on one street was violating the law by selling a work that had been held pornographic, a dealer on the next street could not be prosecuted until he also had been afforded a "prior adversary hearing" concerning the self-same item. And after it had been determined that the current issue of "Spread Eagle," consisting of photographs proclaimed to be for "Adults Only" (State Exhibit 7), violated the statute, the defendant would be free (by simply substituting one model for another) to sell another issue of that prurient publication containing photographs having identical pornographic content.

The Constitution forbids a statute that would punish a dealer for innocently selling pornographic material. The statute must require knowledge — "scienter." *Smith v. California*, 1959, 361 U.S. 147, 80 S.Ct. 215. But, if a statute does so, the evidence is sufficient to justify conviction if it shows the defendant to be "aware of the character of the material" and his action to be "not innocent but calculated purveyance of filth." *Mishkin v. New York*, 1966, 383 U.S. at 512, 86 S.Ct. at 965. Since we unanimously conclude that "scienter"

is a requirement of the Louisiana statute, constitutional requisites are fully satisfied.

"In considering searches incident to arrest, it must be remembered," Justice White said in his dissent in *Chimel v. California*, 1969, ____ U.S. ____, ____, 89 S.Ct. 2034, 2050-2051, "that there will be immediate opportunity to challenge the probable cause for the search in an adversary proceeding. The suspect has been apprised of the search ... and having been arrested, he will soon be brought into contact with people who can explain his rights.... An arrested man, by definition conscious of the police interest in him, and provided almost immediately with a lawyer and a judge, is in an excellent position to dispute the reasonableness of his arrest and contemporaneous search in a full adversary proceeding."

That in my view is all that the state is required to do. It is no longer an acceptable proposition in tort law that a dog is entitled to one free bite;¹ there should be no rule in criminal law — even by virtue of the protection accorded to freedom of speech — that every peddler of pornography is entitled to one free essay at scatology.

Never has the Supreme Court intimated such a requirement. It gave no hint of it when, without exacting any adversary hearing prior to prosecution, it upheld the conviction of a defendant under a New York statute for a sale of obscene materials to minors, in *Ginsberg v. New York*, 1968, 390 U.S. 629, 88 S.Ct. 1274, or when

¹See Prosser on Torts, 516 (3d ed. 1964).

it upheld another conviction under the New York statute for "hiring others to prepare obscene books, publishing obscene books, and possessing obscene books with intent to sell them." *Mishkin v. New York*, 1966, 383 U.S. 502, 86 S.Ct. 958. It is obviously impossible to hold a "prior adversary hearing" with respect to the offense of hiring someone to prepare an obscene book and difficult to conceive that it would be practical to hold one for the offense of publishing them. Nor is the rule this Court now adopts consonant with the conviction affirmed in *Ginzburg v. United States*, 1966, 383 U.S. 463, 86 S.Ct. 942, under an indictment charging violations of the federal obscenity statute.

In *Near v. Minnesota*, 1931, 283 U.S. 697, 716, 51 S.Ct. 625, 631, the Court said, ". . . [T]he protection even as to previous restraint is not absolutely unlimited. . . . [T]he primary requirements of decency may be enforced against obscene publications."² "The phrase,

²The motion picture cases are interesting applications. See, e.g., *Freedman v. Maryland*, 1965, 380 U.S. 51, 85 S.Ct. 734; *Times Film Corp. v. Chicago*, 1961, 365 U.S. 43, 81 S.Ct. 391; *Interstate Circuit Inc., v. City of Dallas*, 1968, 390 U.S. 673, 88 S. Ct. 1298. In *Tyrone Inc. v. Wilkinson*, 4 Cir. 1969, 410 F.2d 639, the court held "that the Constitution requires an adversary hearing to determine obscenity before seizure of a movie." However, the district judge "properly refused to enjoin the state court prosecution for violation of the criminal obscenity statute in the absence of a showing of bad faith enforcement of a statute unconstitutional on its face or as applied." The theatre owner was required to deliver to the prosecuting attorney upon request a copy of the movie for reasonable use in the preparation and trial of the criminal charges. This follows the views expressed in *Metzger v. Percy*, 7 Cir. 1968, 393 F.2d 202, 204, where the court affirmed an injunction ordering return of four prints of a film seized without a search warrant; the affirmed order required the theatre owner to deliver to the prosecuting attorney upon request one print

'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Kingsley Books, Inc. v. Brown*, 1957, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328.³ But even if prior restraint is entirely reprobated, the majority opinion fails to draw the distinction between previous restraint on the right of free speech (like the seizure of a publication before it can be sold) and a criminal statute that imposes subsequent punishment

of the film for use in the trial of the criminal charge. "The decisions of this Court and of the District Court do not prohibit the prosecution under the Indiana obscenity statutes."

³The distinction has been repeatedly referred to although it has seldom been thought necessary to state it at length. But dissenting from a decision later overturned, Chief Justice Warren said in *Times Film Corp. v. Chicago*, 1961, 365 U.S. 43, 53, 81 S.Ct. 391, 397: "[T]his Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment protection." See also, e.g., Justice Brennan's observation in *Ginzburg, supra*, "A conviction for mailing obscene publications, but explained in part by the presence of this element, does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." 383 U.S. at 475, 86 S.Ct. at 949. And in *Near, supra*, the court said, "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions." 283 U.S. at 715, 51 S.Ct. at 630. Cf. Lockhart, Kamisar and Choper, *The American Constitution*, p. 761: "Why should anyone have to take the risk that the Court's judgment of what is obscene will not agree with his own honest belief that it is not obscene under the evolving constitutional standards? . . . Does the current uncertainty as to the standard suggest that imposition of criminal liability except for hard core pornography is inappropriate? That the preferred way to deal with the problem may be to place the book on trial as in *Memoirs*? See Kauper, *supra*, at 71-72; Lockhart & McClure (1960) at 106-07."

on pornography, an activity by definition not protected by the First Amendment.⁴

Concurring in the result in *Roth* and its companion case, *Alberts v. California*, 1957, 354 U.S. 476, 77 S.Ct. 1304, Chief Justice Warren spoke in terms that are applicable here: "The defendants in both these cases were engaged in the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. They were plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct." 354 U.S. at 497, 77 S.Ct. at 1315.

The enactment of a criminal statute is intended to deter unlawful conduct. But any possibility of some other kind of state action against the individual is likewise a possible deterrent. The faint-hearted may be discouraged from pursuing a course of conduct by the

⁴Professor Paul A. Freund has written perceptively about the distinctions between prior restraint and subsequent punishment in the Supreme Court and *Civil Liberties*, 1951, 4 Vand. L. Rev. 533, 537. As he observes, "Certain distinctions commonly drawn between prior restraint and subsequent punishment will not bear analysis." But he writes that there are also real differences between the two and concludes, in language quoted with approval in *Kingsley Books*, *supra*, "In sum, it will hardly do to place 'prior restraint' in a special category for condemnation. What is needed is a pragmatic assessment of its operation in the particular circumstances." 4 Vand. L. Rev. at 539. See also Schwartz, *A Commentary on the Constitution of the United States*, Part III, Rights of the Person, Volume I, Sanctity, Privacy and Expression, §450, pp. 336 et seq. (1968).

possibility of an order to appear in court. Many a man will flinch from any kind of a controversy with the state. Even the threat of facing a judge may be a potential prior restraint, and it is conceivable that some news dealers might be willing to run the risk of a fine rather than bold enough to pay the price of successfully contesting an adversary proceeding. Yet on a record that lacks evidence of any kind dealing with the psychology of individual intimidation, my brothers conclude intuitively that one restraint touches the defendant so lightly as to be lawful while the other bears so heavily as to be invalid.

Were the existence of any touch of "prior restraint" the tincture by which state conduct is stained unconstitutional, then presumably the existence of the possibility of an adversary hearing, or (in other contexts) the possibility of prosecution for criminal libel, or of the filing of a civil suit for libel, would color unlawful all government action in these areas. And it would mar the arrest, without a prior proceeding, of a defendant for violating the federal statute prohibiting the knowing use of the mails to transmit "every obscene, lewd, lascivious, indecent, filthy or vile article," 18 U.S.C. §1461; as well as for transgressing the law that makes it a crime to mail matter containing "upon the envelope or outside cover . . . language of an indecent, lewd, lascivious or obscene character," even though the contents are "otherwise mailable by law"; 18 U.S.C. §1463; and the provision that makes it a crime knowingly to import such material, 18 U.S.C. §1462. And such a requirement would apparently dye entirely unconstitutional 18 U.S.C. §1464, which makes it a criminal offense to utter "any obscene, indecent, or profane

language by means of radio communication," because there would be no way to have a prior adversary hearing with respect to such "one shot" utterances unless all radio communication were required to be previously transcribed.⁵

The procedure suggested in the majority opinion comes almost full cycle to the censorship condemned in *Near, supra*, in 1931. "This is the essence of censorship," the court there said, with regard to a procedure whereby the state might bring a publisher before a judge on a charge of conducting the business of publishing obscene, lewd and licentious matter and obtain an injunction against further publication.

Despite the allegations of the petition, the court does not find that the defendants have harassed the plaintiffs, or that they have employed threats of prosecution to chill freedom of speech, or that there has been any other kind of misuse of the processes of state criminal justice. If there were proof of such facts, a different case would be presented. But the court, in action from which I do not dissent, refrains even from issuing an injunction. It merely declares the state's procedure constitutionally infirm on its face.

⁵A question might be raised whether a warrant could properly be issued to seize pornography for use as evidence in such a "prior hearing," for a search warrant may be issued only for property "designed or intended for use or which is or has been used as a means of committing a criminal offense," Rule 41(b), Federal Rules of Criminal Procedure, or for evidence that a crime has been committed. *Warden v. Hayden*, 1967, 387 U.S. 294, 87 S.Ct. 1642.

When the Supreme Court, only a few weeks ago, held it unconstitutional to make private possession of obscene material a crime it said, "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley v. Georgia*, 1969, ____ U.S. ____, ____, 89 S.Ct. 1243, 1249. If this be true, the Constitution does not deny the state the power to arrest a person on a charge of selling pornography that appeals only to prurency, affronts all community standards, and completely lacks social worth without first haling that person into court to caution him that what he is doing is unlawful. From the proposition that this is what the Constitution means I must dissent.*

*If the arrest had been valid, it would have been necessary to consider the validity of the seizures made of some of the material involved under the doctrine of the *Chimel* case, *supra*, and the possible applicability of the rule of that case to seizures made before it was decided. It would then also have been necessary to consider whether those particular publications obtained properly (for example by lawful seizure or by purchase) are protected by the First Amendment.

But since the majority does not reach these questions, it is needless to comment on them. Indeed, these might be matters for a single judge to decide after resolution of the questions involving constitutionality of the state statute.

Nor is there need for comment about the nature of the publications. Although they are unfit for publication in the published reports, I attach for the record xerox copies of the covers of five of them. The covers alone show that they proclaim the "leer of the sensualist," *Ginzburg*, 383 U.S. at 468, and that no dealer could fail to recognize the likely pornography of the contents.

(Signed) ALVIN B. RUBIN
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
September 3, 1969

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title Omitted in Printing)

Filed: Sep. 12, 1969

Notice is hereby given that Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling, the defendants herein above named, hereby appeal to the Supreme Court of the United States from the Judgment rendered by the three-Judge Court on the 13th day of August, 1969, entered in this action on the 14th day of August, 1969.

This appeal is taken pursuant to 28 U.S.C.A. §§ 1253.

(Signed) CHARLES H. LIVAUDAIS,
CHARLES H. LIVAUDAIS,
Attorney for Appellants

(Signed) PRESTON H. HUFFT
PRESTON H. HUFFT,
Attorney for Appellants

(Certificate of Service Omitted)

ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title Omitted in Printing)

Filed: Sept. 15, 1969

Upon request of Counsel for Defendant-Appellants, and with the concurrence of Judges John Minor Wisdom and Edward J. Boyle, and having found pursuant to Subdivision 3, Rule 12 of the Rules of the Supreme Court of the United States as amended, that it is necessary and proper that the original exhibits (books, magazines and other publications) filed by defendants in this case under this docket number should be inspected by the Supreme Court of the United States in lieu of copies; and further that there should accordingly be a stay of the Order of this Court which directed that all seized materials be returned, instanter, by the defendants to those plaintiffs from whom they were seized,

IT IS HEREBY ORDERED That the Clerk of this Court is authorized and he is hereby directed to transport to the Clerk of Court of the Supreme Court of the United States all of the exhibits (books, magazines and other publications) filed by defendants in this case under this docket number, for inspection by the Supreme Court of the United States in lieu of copies; that the Clerk request the Clerk of Court of the Supreme Court of the United States to keep such original Exhibits safely, and request to return to this Court those Exhibits when they have served their purpose, all such original exhibits to be returned to the custody of the Clerk of this Court;

IT IS FURTHER ORDERED That there be a stay of the Order of this Court which directed that all seized materials be returned, instantler, by the defendants to those plaintiffs from whom they were seized.

New Orleans, Louisiana, this 15th day of September, 1969.

(Signed) ALVIN B. RUBIN
District Judge

/s/ CHARLES H. LIVAUDAIS
Attorney for Defendants-Appellants

MOTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Apr. 8, 1970

Now into Court come Leander H. Perez, Jr., Louis Reichart, George Bethea and Earl Wendling, through undersigned counsel, and move the Court for the following relief:

I.

That movers be relieved of the necessity of a "prior adversary judicial determination of obscenity" in enforcing LSA-R.S. 14:106, as imposed by this Court by Judgment rendered herein on July 14th, 1969;

II.

That the Court set aside that portion of the Judgment which ordered that all materials be returned, instant, to plaintiffs, and which further ordered that the said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs;

III.

That a day be set by this Court for the hearing of this Motion.

CHARLES H. LIVAUDAIS
Attorney for Movers
(Signed) CHARLES H. LIVAUDAIS
Post Office Box 1295
Chalmette, Louisiana 70043
Phone: 271-1658

ORDER

Considering the foregoing Motion it is ordered that there be a hearing on same on Wednesday, the 22nd day of April, 1970, at 2:00 o'clock P.M.

New Orleans, Louisiana this 10th day of April, 1970.

(Signed) EDW. J. BOYLE, SR.
JUDGE

(Certificate of Service omitted)

MEMORANDUM IN SUPPORT OF MOTION

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

May It Please The Court:

By Judgment rendered herein on the 14th day of July, 1969, the requirement of a "prior adversary judicial determination of obscenity" was imposed by this Court upon defendants in the enforcement of LSA-R.S. 14:106, and it was ordered by this Court that the materials involved be returned, *instanter*, to plaintiffs, and be suppressed as evidence in any pending or future prosecutions of plaintiffs.

In the same Judgment this Court retained Jurisdiction for the issuance of any further orders as may be necessary and proper.

Since the rendition of said Judgment the issue of the necessity of a "prior adversary judicial determination of obscenity" in cases such as ours has been directly placed before, and decided by, the Supreme Court for the United States of America, which has summarily affirmed the decision of a Three Judge Court in the United States District Court, S.D. New York, which held in two cases that there need not be an adversary hearing before an arrest for obscenity.

(New York Feed, Co., Inc. v. Leary and Milky Way Productions, Inc. v. Leary, Supreme Court Case Nos. 992 and 998, ____ U.S. ____, ____ S. Ct. ____, 38 LW 3335). Copies of the decision of the Three Judge Court and of the United States Law Week report are attached hereto for the convenience of the Court.

In view of the decision of the United States Supreme Court in the above, it is submitted that the relief sought in the Motion filed herewith should be granted.

Respectfully submitted,

CHARLES H. LIVAUDAIS,
Attorney for Movers
Post Office Box 1295
Chalmette, Louisiana 70043
Phone: 271-1658

(Certificate of Service omitted)

ORDER

United States District Court
Eastern District of Louisiana
New Orleans Division

(Title omitted in printing)

Filed: Jun. 3, 1970

The Court on April 22, 1970 heard the defendants' Motion to "be relieved of the necessity of a 'prior adversary judicial determination of obscenity' in enforcing LSA-R.S. 14:106, as imposed by this Court by Judgment rendered herein on July 14, 1969" and to "set aside that portion of the Judgment which ordered that all materials be returned, instantler, to plaintiffs, and which further ordered that the said materials be suppressed as evidence in any pending or future prosecutions of the plaintiffs," and the matter was taken under submission.

After considering the oral arguments and memoranda of counsel, the Court is of the opinion that the Motion should be, and it is hereby, DENIED.

Judge Alvin B. Rubin re-affirms his views expressed in his partial dissenting opinion previously filed herein.

New Orleans, Louisiana, June 2, 1970.

(Signed) JOHN MINOR WISDOM
UNITED STATES CIRCUIT
JUDGE

(Signed) EDW. J. BOYLE, SR.
UNITED STATES DISTRICT
JUDGE

(Signed) ALVIN B. RUBIN
UNITED STATES DISTRICT
JUDGE

Jack Peebles, Esq.

Charles H. Livaudais, Esq.

Supreme Court of the United States

No. 837 ----- , October Term, 19 69

Leander H. Perez, Jr.,
et al., Appellants,

v.

August M. Ledesma, Jr., et al.

APPEAL from the United States District Court for
the Eastern District of Louisiana.

The statement of jurisdiction in this case having
been submitted and considered by the Court, further con-
sideration of the question of jurisdiction is postponed
to the hearing of the case on the merits and the case is
placed on the summary calendar and set to be argued with
No. 4, Younger v. Harris, No. 6, Boyle v. Landry, No. 11,
Samuels v. Mackell, No. 20, Fernandez v. Mackell, No. 565,
Dyson v. Stein, and No. 1149, Byrne v. Karalexis. In addition
to the questions presented in the jurisdictional statement
the parties are requested to brief and argue the following
questions:

"(1) Was it an appropriate exercise of discretion for the
three-judge court to grant the relief in paragraphs 1 and
2 of the judgment of August 14, 1969, in view of the pendency
of the State prosecution charging violation of Louisiana
Revised Statutes 14:106?

"(2) Was it an appropriate exercise of discretion for the
three-judge court in paragraph 4 of said judgment to declare
the St. Bernard Parish Ordinance No. 21-69 unconstitutional?"